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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDWARD H. KOCH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a land patent from the United States granting title to surveyed riparian land also grants title to unsurveyed islands in the adjacent stream.

PARTIES TO THE PROCEEDING

The petitioners are the United States of America, the Department of the Interior, the Interior Board of Land Appeals, and the Bureau of Land Management. The respondents are Edward H. Koch, Walter B. Lemon, Roberta A. Lemon, Edward N. Juhan, and Anthony F. Zarlengo.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 47 F.3d 1015. The opinion of the district court (App., *infra*, 68a-80a) is reported at 814 F. Supp. 996. The opinion of the Interior Board of Land Appeals (App., *infra*, 39a-67a) is reported at 118 I.B.L.A. 38. The opinion of the administrative law judge (App., *infra*, 18a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1995. A petition for rehearing was denied on April 13, 1995 (App., *infra*, 81a-82a). On

July 6, 1995, Justice Breyer extended the time for filing a petition for a writ of certiorari to and including August 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 3, Clause 2, of the United States Constitution provides in relevant part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

The statutory provisions governing the land patents at issue in this case are set out in the Revised Statutes of 1873, as amended. See Rev. Stat. §§ 2353 *et seq.* (1875 ed.); Rev. Stat. Supp. I (2d ed. 1874-1891); Rev. Stat. Supp. II (1892-1901)). Those provisions were later codified in Title 43 of the United States Code, but repealed by various enactments. See 43 U.S.C. 671 *et seq.* Relevant provisions are set out in the appendix to this petition. See App., *infra*, 83a-84a.

STATEMENT

In 1982, the Department of the Interior's Bureau of Land Management (BLM) conducted an investigation of certain land masses in a stretch of the Colorado River in the State of Colorado and concluded that some of those land masses constituted previously unsurveyed islands that are part of the public domain. Respondents, who own land bordering the Colorado River, challenged the BLM's determination, claiming that the federal patents that had originally conveyed the riparian land into private ownership

had also conveyed the disputed acreage. See App., *infra*, 15a-17a, 18a-38a. The Interior Board of Land Appeals (IBLA) rejected respondents' claims, holding that the previously unsurveyed islands at issue remain under federal ownership. *Id.* at 39a-67a. The United States District Court for the District of Colorado affirmed the IBLA's factual determinations, but concluded as a matter of law that the federal patents granting title to surveyed riparian lands also granted title to unsurveyed islands within the river. *Id.* at 68a-80a. The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision. *Id.* at 1a-14a.

1. Since the formation of the Union, our Nation has faced important questions concerning the acquisition, measure, and disposition of the public domain. After the Declaration of Independence, the newly declared States asserted competing claims to the "Western Territory," and they were able to ratify the Articles of Confederation only after New York, Connecticut, and Virginia agreed to cede most of their western land claims. See B.H. Hibbard, *A History of the Public Land Policies* 7-11 (1939). The Continental Congress recognized that ceded lands comprised its chief asset and that the national interest would be advanced if those lands were settled. See *id.* at 32-55. See also, *e.g.*, C.A. White, *A History of the Rectangular Survey System* 9-15 (1983); R.M. Robbins, *Our Landed Heritage* 3-11 (2d ed. 1976); 3 J. Story, *Commentaries on the Constitution* § 1310 (1833).

In 1784, the Continental Congress appointed a committee led by Thomas Jefferson to examine how the ceded western lands should be administered. See 7 *The Papers of Thomas Jefferson* 147 (J.P. Boyd ed.,

1953) [hereinafter *Jefferson Papers*]. Jefferson had prior experience in the development of a Land Office for the Commonwealth of Virginia, see 2 *Jefferson Papers* 133-154, and he was deeply interested in the future of western lands, see 6 *Jefferson Papers* 581-617. The Jefferson committee proposed that the public land be surveyed and divided into contiguous rectangles, and then subdivided and made available for public purchase and settlement. See *Report of a Committee to Establish a Land Office* (Apr. 30, 1784) (*reprinted in* 7 *Jefferson Papers* 140-147); see also 26 J. Continental Cong. 324-330 (1784). The committee recognized that survey before sale would reduce the prospect of overlapping claims, simplify land records, and provide a fair system of disposition. See C.A. White, *supra*, at 11.

Soon after the Jefferson committee issued its report, Jefferson left on a diplomatic mission to Europe (7 *Jefferson Papers* 2), and the Continental Congress considered the committee's recommendations in his absence. See 28 J. Continental Cong. 114, 264, 298-302 (1785). The Congress ultimately adopted "An Ordinance for ascertaining the mode of disposing of Lands in the Western Territory." *Id.* at 375-381. The so-called Land Ordinance of 1785 adopted the Jefferson committee's basic concept of a rectangular survey system, which has since provided the basic framework for determining the boundaries of the public domain and remains largely in place today. See C.A. White, *supra*, at 11-15; R.M. Robbins, *supra*, at 7-8; B.H. Hibbard, *supra*, at 37-41; see also *Papasan* v. *Allain*, 478 U.S. 265, 268-269 & n.3 (1986); 43 U.S.C. 751 *et seq.*[1]

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[1] The Land Ordinance of 1785 provided that the Geographer of the United States would direct surveyors to establish

The Constitution of the United States, which was proposed by the constitutional convention two years later, vested in Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Following ratification of the Constitution, Congress continued the practice of disposing of public land by clearing Indian title, identifying and dividing the land through rectangular survey, and offering it for public sale. See, *e.g.*, Act of May 18, 1796, ch. 29, 1 Stat. 464; Act of May 10, 1800, ch. 55, 2 Stat. 73; Act of Mar. 26, 1804, ch. 35, 2 Stat. 277.

The Jefferson committee's innovative concept of a cadastral survey system became a monumental undertaking during the nineteenth century. Congress extended the boundaries of the United States through various means, including the Louisiana Purchase, the Florida Purchase, the annexation of Texas, the acquisition of the Oregon Territory, the Mexican cession and sale of territory, and the Alaska Purchase, see B.H. Hibbard, *supra*, at 14-31, which led to a

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a system of rectangular boundaries for all public land that was no longer subject to Indian claims. Beginning at the Ohio River, the surveyors would divide and mark the public land into contiguous six-square-mile townships, unless aquatic bodies or Indian boundaries required the creation of fractional townships. The Geographer would prepare plats that would depict the township boundaries and divide them by protraction into 36 one-square-mile lots (except where fractional lots were necessary). The lots (now known as sections) would then be offered for public sale at a price of not less than one dollar per acre plus survey costs. The United States would retain four lots out of every township and the right to one-third of all minerals. In addition, one central lot in every township would be set aside for public schools. See C.A. White, *supra*, at 11-15. Compare 43 U.S.C. 751 *et seq.*

six-fold increase in the size of the public domain, see P.W. Gates & R.W. Swenson, *History of Public Land Law Development* 86 (1968). Congress directed that those lands should be included in the rectangular survey system, see *e.g.*, C.A. White, *supra*, at 51-57, and it provided through various laws that the land, once surveyed, would be available for purchase or other means of acquisition, see, *e.g.*, Act of Apr. 24, 1820, ch. 51, 3 Stat. 566.

2. From 1797 to 1910, a period that embraced the most significant part of the western migration, the federal government relied on contract surveyors, who were paid by the mile surveyed, to identify and survey the public domain in preparation for disposition and settlement. See C.A. White, *supra*, at 34, 186, 231. As the undertaking progressed, the federal government refined surveying practices through formal and informal announcements and through the issuance of a Manual of Surveying Instructions, which was published in 1855 and has been revised periodically since that time. See BLM, *Manual of Surveying Instructions* (1973); C.A. White, *supra*, at 231-764 (reproducing surveying instructions from 1804 through 1910).

Despite that guidance, the surveying practices were not always certain or uniform, and surveyors did not always understand or fastidiously follow the guidance given them. See, *e.g.*, C.A. White, *supra*, at 100-101, 119-126. In addition, lands that were not likely to be purchased (such as mountain peaks, small islands, and other lands unsuitable for cultivation) were typically not surveyed, particularly if the survey would entail great cost. See, *e.g.*, *id.* at 81, 126-127, 134-135, 154; see also Act of Mar. 3, 1853, ch. 145, § 3, 10 Stat. 245 (directing that sections in California that are "unfit for cultivation" should not

be surveyed). For those and other reasons, the public domain is not completely surveyed, and the BLM continues to conduct original surveys, as well as resurveys, of public lands. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, directs the Secretary of the Interior to complete the surveying process "[a]s funds and manpower are made available." FLPMA § 201, 43 U.S.C. 1711; see 43 C.F.R. Pt. 9180.

3. This case concerns a dispute over six islands in a 15-mile, non-navigable stretch of the Colorado River between Glenwood Springs and Grand Junction, Colorado. The government conducted its first surveys in the general vicinity between 1883 and 1887, but the area immediately surrounding the specific parcels in question was not surveyed until 1889 and 1891. The surveyors meandered the riparian upland, but they did not meander the islands in the adjacent river. Hence, the islands were not surveyed. They were mentioned, however, in the surveyors' field notes and sketched onto the accompanying plat, which created a reference for future survey and disposition. See App., *infra*, 40a-41a.

Between 1892 and 1894, various private parties purchased the fractional riparian lots that are relevant to this dispute. The United States sold the land under the Act of Apr. 24, 1820, as amended. See Rev. Stat. §§ 2353 *et seq.* (1875 ed.); Rev. Stat. Supp. I (2d ed. 1874-1891); Rev. Stat. Supp. II (1892-1901). The law in effect at the time of sale set a minimum purchase price of $1.25 per acre. Rev. Stat. § 2357 (1875 ed.). The federal patents that conveyed the land identified the purchased property by reference to the fractional lot descriptions contained in the official plat, which was created through the 1889 and 1891 surveys. The patents

specified the number of acres contained in each purchased lot, measured to one-hundredth of an acre. The patents did not include unsurveyed islands within that acreage specification. See App., *infra*, 40a-41a (noting that the islands were not meandered by the original surveyors).

4. In 1982, the BLM commenced an investigation to review the results of the 1889 and 1891 surveys and to determine ownership of 22 land masses in that reach of the Colorado River. The investigation was prompted by inquiries from local landowners and others who were interested in developing mineral resources (including sand, gravel, and natural gas) in the area. The BLM reviewed the original survey records and other sources, conducted a thorough field examination, and determined that nine of the land masses, which had not been meandered in the original surveys, were islands that have been in continuous existence since that time. The BLM surveyed the islands, announced its intention to file plats identifying those islands as unconveyed public lands, and denied protests from the owners of adjacent riparian tracts. See App., *infra*, 15a-17a, 41a-42a; see also *United States* v. *Lemon*, 632 F. Supp. 431 (D. Colo. 1986) (allowing government surveyors entry to conduct surveys).

Respondents, who own riparian land as successors of the nineteenth century patentees, sought administrative review of the BLM's decision. See 43 C.F.R. 4.1 *et seq.* The IBLA referred the matter to an administrative law judge (ALJ), who ruled that the six land masses that respondents had placed in issue were not islands at the time of the original survey, but rather were impermanent parts of the nonnavigable stream's bed. The ALJ concluded that the patents gave the riparian owners title to those por-

tions of the streambed to the mid-point of river. See App., *infra*, 18a-38a. The IBLA reversed the ALJ's decision. *Id.* at 39a-67a. The IBLA examined the record, including a stipulation by the parties, and concluded that the parcels, which ranged in size from 7 to 67 acres, *id.* at 40a n.1, "were islands, not mere topographic features, at the time of the original surveys," *id.* at 65a. It continued:

> A consequence of that holding is that the failure of the original surveyors to survey the islands in question must either have been the result of an error or simply the consequence of an official or unofficial Government policy not to survey islands unsuitable for cultivation. In either case, their failure to survey the islands did not divest the United States of title to those islands.

Id. at 65a-66a (footnotes omitted). The IBLA accordingly rejected the riparian owners' challenge to the BLM's survey. *Id.* at 66a-67a.

5. The riparian landowners sought judicial review of the IBLA's decision.[2] The district court ruled that

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[2] The district court determined that it had jurisdiction under 28 U.S.C. 1331. App., *infra*, 69a. Because the plaintiffs' suit challenged the United States' title to the islands in dispute, the district court should have also relied on the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, as a basis for jurisdiction. The QTA provides "the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983). Although the plaintiffs failed to invoke the QTA, their suit satisfied the pertinent requirements of the statute. It properly named the United States as a party, 28 U.S.C. 2409a(a), was sufficiently specific with respect to the lands in question, 28 U.S.C. 2409a(d), and was filed within the QTA's limitations period, 28 U.S.C. 2409a(g). The district court was therefore lawfully vested with jurisdiction over the plaintiffs' suit.

"the IBLA's decision that the land masses in question were 'islands' at the time of the original survey is undoubtedly supported by substantial evidence in the record." App., *infra*, 74a. The court nevertheless concluded that the riparian landowners held title to the islands. It reasoned that, "if the government conveys riparian land along non-navigable waters and there is an absence of evidence whether the government also intended to convey title to islands located within the river, title to the islands passes according to the law of the state in which the property is located.'" *Id.* at 75a-76a.

The court found "no clear evidence that the government intended to reserve the islands when it conveyed the riparian land," and it concluded that, as a result, "ownership of the islands must be determined in accordance with Colorado law." App., *infra*, 79a. The court acknowledged that Colorado law does not squarely address the issue. The court nevertheless held that "it is reasonable to conclude" that Colorado would follow what the court understood to be the "common law rule" that "grants of land on a non-navigable river entitle the grantee to all islands lying between the mainland and the thread of the stream." *Id.* at 79a-80a.

The court of appeals affirmed. App., *infra*, 1a-14a. It concluded that "[n]othing in the record clearly reveals the government's intent with respect to patents affecting the islands at issue." *Id.* at 8a. The court acknowledged that the extent of a federal grant "is necessarily a federal question," *id.* at 9a (quoting *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 320 (1973)), and that normally "any ambiguity in a grant is to be resolved favorably to a sovereign grantor," App., *infra*, 8a-9a (quoting *Great N. Ry.* v. *United States*, 315 U.S. 262, 272 (1942)). The

court nevertheless concluded that those principles do not control the issue here.

The court of appeals instead ruled that in the "select area of cases" involving riparian land, "federal law directs a court to look to state law to resolve the dispute." App., *infra*, 9a (citing *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977)). The court of appeals accordingly determined that it should "look to Colorado state law to ascribe rights in the property at issue here." App., *infra*, 11a. It agreed with the district court that the Colorado legislature and courts had not addressed the issue. It nevertheless concluded that Colorado would recognize the riparian landowners, rather than the United States, as owners of the islands. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents an important question of public land law that has generated a serious and irreconcilable conflict among the courts of appeals. The Constitution vests Congress alone with the power to dispose of the public domain. Congress has consistently elected to provide for the survey of public lands, including islands, before placing them in private hands. Until recently, it was clear under federal law governing surveys of public land that the United States retained ownership of unsurveyed islands. See *Moss* v. *Ramey*, 239 U.S. 538 (1916); *Scott* v. *Lattig*, 227 U.S. 229 (1913); *R.A. Mikelson*, 26 I.B.L.A. 1 (1976); *Emma S. Peterson*, 39 Pub. Lands Dec. 566 (1911); BLM, *Manual of Surveying Instructions* § 3-122 (1973). A series of court of appeals decisions, culminating in this case, has called that principle into question. Those decisions divest the United States of public land that the government did not

sell, and they grant title to private parties who did not pay for its purchase.

1. The court of appeals' decision raises an important issue of federal land management that will affect the government's oversight of the public domain. Congress recognized in the Federal Land Policy and Management Act of 1976 (FLPMA) that existing surveys have not identified all of the government's land holdings, and it directed the Secretary of the Interior to locate and establish the boundaries of public lands, such as small islands, that remain unsurveyed. FLPMA § 201, 43 U.S.C. 1711. Congress instructed the Secretary to undertake those surveys because it understood that unsurveyed lands are a component of the public domain that remain subject to Congress's control.[3] If Congress is mistaken, then it should know now, before it takes further action with respect to the retention or disposition of the affected lands.[4]

The uncertainty resulting from the court of appeals' decision also is likely to have significant practical consequences with respect to land-title litigation, where the law should be certain. See *Arizona* v. *California*, 460 U.S. 605, 620 (1983). The Department of the Interior estimates that the contiguous States

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[3] See FLPMA § 211, 43 U.S.C. 1721 (authorizing the Secretary of the Interior to convey unsurveyed islands to the States and their political subdivisions). See also 43 C.F.R. 9185.2-3.

[4] See, *e.g.*, Minnesota Public Lands Improvement Act of 1990, Pub. L. No. 101-442, 104 Stat. 1020 (conveying originally unsurveyed lands, including unsurveyed islands, to the State of Minnesota); Michigan Public Lands Improvement Act of 1988, Pub. L. No. 100-537, 102 Stat. 2711 (conveying originally unsurveyed lands, including unsurveyed islands, to the State of Michigan).

(excepting Texas and the States that comprised the original thirteen colonies) contain approximately 11,000 unsurveyed islands that, from the United States' perspective, continue to remain within the public domain. As this case demonstrates, many of those islands, which were once considered worthless as agricultural land, are now recognized as valuable for purposes of mineral development, recreation, or wildlife propagation.

The United States has consistently maintained that it owns unsurveyed public lands, including unsurveyed islands. See, *e.g.*, BLM, *Manual of Surveying Instructions* § 3-122 (1973). The court of appeals' decision casts a cloud on the United States' title in the western States, and it will encourage riparian owners—including private parties, States, and Indian Tribes—to claim ownership of those islands and to attempt to exclude the federal government or its successors from those lands. Consequently, disputes like the one here can be expected to arise with greater frequency. Given the need for certainty and predictability in questions of property ownership, it is especially appropriate for the Court to resolve the issue now.

2. The question presented here is ripe for this Court's resolution because it has generated a square conflict among the circuits that has unsettled the Court's own precedents. Until recently, this Court's decisions in *Scott* v. *Lattig*, *supra*, and *Moss* v. *Ramey*, *supra*, had controlled the question of ownership of unsurveyed islands. The court of appeals' decision erroneously puts the vitality of those precedents into doubt.

In *Scott* v. *Lattig*, a riparian landowner named Lattig brought suit in an Idaho state district court to quiet title to Poole Island, a 138-acre unsurveyed

island located in a navigable portion of the Snake River.[5] The Idaho district court ruled that Lattig owned the island by virtue of his patent to riparian land, and the Idaho Supreme Court affirmed. 17 Idaho 506 (1910). This Court reversed. The Court stated that "it is manifest that the island, if in existence at the time of the survey in 1868, was then public land of the United States." 227 U.S. at 241. The Court then ruled that the United States' patent of surveyed riparian land on the banks of the river did not convey the unsurveyed island. *Id.* at 241-244.[6]

The Court distinguished prior cases vesting riparian owners with title to certain offshore formations. It explained that those cases involving "so-

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[5] The riparian lands were surveyed in 1868, but the island was neither surveyed nor mentioned in the field notes or plat. Lattig acquired his riparian land by succession to an 1894 patent. The defendant, Scott, settled on the island in 1904, and when the island was surveyed in 1906, he filed an application for a homestead. 227 U.S. at 239-241.

[6] The Court first ruled that the surveyor's apparent error in omitting the island from the 1868 survey "did not divest the United States of the title or interpose any obstacle to surveying it at a later time." 227 U.S. at 241-242. The Court next ruled that Idaho's admission as a State in 1890 also had no effect on the United States' title, explaining that, while the beds of navigable rivers pass to the State upon admission, *id.* at 242-243, the island "was not part of the bed" and "therefore remained the property of the United States and subject to disposal under its laws," *id.* at 244. Finally the Court recognized that the disposal of the riparian land did not alter the United States' title, citing the established rule that "proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream." *Ibid.* (quoting *Railroad Co.* v. *Schurmeir*, 74 U.S. (7 Wall.) 272, 287 (1868)).

called islands" were limited to offshore land masses that did not actually qualify as islands. See 227 U.S. at 244.[7] The Court quoted with approval a passage from *Whitaker* v. *McBride*, 197 U.S. 510, 515 (1905) —which, the Court noted, involved "a small island, in a non-navigable river," 227 U.S. at 245—stating that

> the Government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or preëmption entry.

227 U.S. at 245.

Three years later, the Court applied its rationale in *Scott* v. *Lattig* to a virtually identical situation in *Moss* v. *Ramey*, *supra*. *Moss* involved a question of ownership of a 120-acre island in the Snake River. The Court explained that "[t]he descriptive terms in the patents embraced the lots abutting on the river, as shown on the plat, but not this [unsurveyed] island lying between the lots and the thread of the stream." 239 U.S. at 546. The Court distinguished

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[7] The Court distinguished *Grand Rapids & I. R.R.* v. *Butler*, 159 U.S. 87 (1895), on the ground that "the so-called island" in question appeared to be "a low sand bar" that was in fact submerged land, and it distinguished *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908), on the ground that the islands in question were "little more than rocks rising very slightly above the level of the water" that were treated as part of the streambed. See *Scott*, 227 U.S. at 244.

Moss from situations involving submerged lands, noting that the island was of "stable formation." *Ibid.* Accord *Texas* v. *Louisiana*, 410 U.S. 702, 713 (1973); *Mission Rock Co.* v. *United States*, 109 F. 763, 769-770 (9th Cir. 1901), aff'd, 189 U.S. 391 (1903).

The Court's decisions in *Moss* v. *Ramey* and *Scott* v. *Lattig* laid down a clear and certain rule: A federal patent conveying surveyed riparian lands does not convey unsurveyed islands in the adjacent stream.[8] In more modern times, two federal courts of appeals have followed those decisions and held that a federal patent of riparian land does not convey unsurveyed islands. See *Ritter* v. *Morton*, 513 F.2d 942 (9th Cir.), cert. denied, 423 U.S. 947 (1975); *United States* v. *Severson*, 447 F.2d 631 (7th Cir. 1971), cert. denied, 404 U.S. 1039 (1972). However, two other courts of appeals (in addition to the Tenth Circuit) have ruled that *Scott* is not controlling and have reached a contrary result. See *Wolff* v. *United States*, 967 F.2d 222, reh'g denied, 974 F.2d 702 (6th Cir. 1992); *Bourgeois* v. *United States*, 545 F.2d 727 (Ct. Cl. 1976).

The conflict is a serious one because it places in opposition the two courts of appeals—the Ninth Circuit and the Tenth Circuit—that embrace the "eleven contiguous Western States" (FLPMA § 103(*o*), 43 U.S.C. 1702(*o*)) and that most commonly face questions of public land law. Moreover, the various courts have addressed the issue in fundamentally different ways:

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[8] Both before and after this Court's decisions, state supreme courts followed the rule set out in those cases. See *Bode* v. *Rollwitz*, 199 P. 688 (Mont. 1921); *State* v. *Nolegs*, 139 P. 943 (Okla. 1914); *Steinbuchel* v. *Lane*, 51 P. 886 (Kan. 1898).

a. In the first of the appellate decisions cited above, *United States* v. *Severson*, the United States brought suit to quiet title to portions of an island and a former island, comprising about 275 acres, in the Wisconsin reach of the Mississippi River. The defendants claimed that they had received title to those unsurveyed islands as a consequence of the grant of riparian land. The district court ruled that the United States owned the islands, 309 F. Supp. 915 (W.D. Wis. 1970), and the Seventh Circuit affirmed, 447 F.2d 631 (1971).

The Seventh Circuit agreed with the district court's determination that the islands were in existence at the time the patent was issued and that the scope of the patent's conveyance presented a question of federal law. 447 F.2d at 633-634. The Seventh Circuit concluded that the controlling legal principles were set out in this Court's decision in *Scott*, see 447 F.2d at 635, stating:

> Applying the explanations in Scott v. Lattig to our present case, the unsurveyed islands, existing at the time of statehood, remained the property of the United States, and although at the time of the patents, Wisconsin law operated to pass title to the riverbed to the patentees, Wisconsin law could not and the patents did not convey to the patentees the unsurveyed islands.

Ibid. See also *Blask* v. *Sowl*, 309 F. Supp. 909 (W.D. Wis. 1967) (ejectment action involving the same property).

b. In the next case, *Ritter* v. *Morton*, an owner of land along the Idaho reach of the Snake River claimed ownership of three unsurveyed islands ranging in size from .84 to 8.99 acres. The district court ruled that the riparian owner was entitled to the

islands because they were "east of the water course of the Snake River, which constitutes the actual boundary of the land conveyed by the patent." See 513 F.2d at 945. The Ninth Circuit reversed that ruling. *Id.* at 949-951.

The Ninth Circuit held that federal law governed the issue, 513 F.2d at 946, and it concluded that this Court's decision in *Scott* v. *Lattig* was "directly applicable to our case, both for its legal statements and for its factual similarity," *id.* at 948. The Ninth Circuit ultimately concluded, based on the "totality" of the factual record, that the United States held title to the islands.[9]

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[9] Although the Ninth Circuit reached the correct result, it misunderstood *Scott*'s holding. The court correctly recognized at the outset of its discussion that the water course itself, rather than the surveyor's meander lines, normally defines the riparian boundary of a fractional lot. 513 F.2d at 946. See, *e.g.*, *Schurmeir*, 74 U.S. (7 Wall.) at 286-287. As the Ninth Circuit noted, sometimes "special circumstances" dictate treating meander lines as a boundary. It concluded that *Scott* had invoked that principle and treated a meander line as a "strict boundary" that excluded islands between that line and the thread of the river. 513 F.2d at 948. Applying that interpretation of *Scott*, the Ninth Circuit evaluated the riparian owner's claim in terms of the location of the meander line and concluded, based on the "totality" of the record, that the United States held title to the islands. *Id.* at 949-951.

Scott, however, did not treat meander lines as a "strict boundary" in deciding that the unsurveyed islands were public lands. See 227 U.S. at 244 (noting that the riparian owner holds title "to the stream"). It rested on the more straightforward principle that the government had not surveyed the island and therefore could not be deemed to have conveyed it. *Id.* at 241-242 ("the error in omitting it from the survey did not divest the United States of the title or interpose any obstacle to surveying it at a later time"); *id.* at 245 (a citizen cannot "assume that the island ought to

c. The third case, *Bourgeois* v. *United States*, involved title to a 6.76-acre island in Michigan's non-navigable Jewel Lake. The United States surveyed the land around Jewel Lake in 1846, and it patented that land in 1866. The plaintiff purchased a littoral lot in 1939 as a successor to one of the original patentees. The government surveyed the island in 1958. It thereafter posted the island as public land, and the plaintiff brought suit seeking compensation for a taking by the government, claiming that she received the island as a successor to the 1866 patent. On cross-motions for summary judgment, the Court of Claims ruled that she was entitled to recover. 545 F.2d at 728-729.

The Court of Claims recognized that the scope of the 1866 patent presented a federal question and that this Court held in *Scott* v. *Lattig* that the United States retained title to an unsurveyed island. The Court of Claims distinguished *Scott*, however, on the ground that it involved a navigable river. The court stated that when disputes arise over the beds of non-navigable waterways, "federal law looks to the law of the state in which the land lies." 545 F.2d at 730 (citing *Oklahoma* v. *Texas*, 258 U.S. 574, 594-595 (1922)). The court concluded:

> Given the choice between the navigable water island cases [*e.g.*, *Scott*] and the non-navigable water bed cases, *the best analogy is the non-navigable water bed law.* To reach this result

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have been surveyed, and proceed to occupy it for the purposes of homestead or preëemption entry"). At bottom, the *Ritter* case, like *Scott*, involved unsurveyed islands, and the Ninth Circuit was correct in following *Scott*, even if it misunderstood *Scott*'s rationale.

> we concentrate on the fact of accessibility, particularly with reference to the time of the grant.

545 F.2d at 731 (emphasis in original). The court reasoned that if the United States conveys the shores of a non-navigable body of water without preserving a means of access to an unsurveyed island, the United States' rights should be resolved under state law, which in that case vested ownership in the owner of the shore. *Ibid.*[10]

d. The fourth case, *Wolff* v. *United States*, confused the issue still further. The plaintiffs claimed title to a .90-acre unsurveyed island in Arbutus Lake, located within the State of Michigan. They based their claim on an 1871 patent that conveyed littoral land. The district court concluded that the plaintiffs owned the island, 770 F. Supp. 1205 (W.D. Mich. 1991), and the Sixth Circuit affirmed, 967 F.2d 222, reh'g denied, 974 F.2d 702 (1992).

The Sixth Circuit concluded that the scope of the federal patent should be evaluated according to the law of the State in which the lands lie. 967 F.2d at 224 (citing, among other cases, *Oklahoma* v. *Texas*, *supra*; *Whitaker* v. *McBride*, *supra*; and *Hardin* v. *Jordan*, 140 U.S. 371, 384 (1891)). The court distinguished *Moss* v. *Ramey* and *Scott* v. *Lattig* on the basis that they involved much larger islands and that

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[10] The Court of Claims overlooked that *Scott* had indicated, by virtue of its reliance on *Whitaker* v. *McBride*, that the same principles would apply in the case of an island in non-navigable waters. *Scott*, 227 U.S. at 244-245. As the Court later recognized in *Moss*, the controlling issue is whether the land mass is an island of "stable formation" and whether the government "treat[s] it as public land," 239 U.S. at 546—not whether the island is located in navigable or non-navigable waters.

it was therefore reasonable to conclude that the United States did not intend to convey them. The court saw "no reason to suppose that the United States intended to retain the island" in Arbutus Lake, and it therefore ruled that, under Michigan law, the island passed to the riparian owners. 967 F.2d at 226. It concluded, contrary to the Court of Claims' decision in *Bourgeois*, that the same result would obtain whether the waterway was navigable or non-navigable. *Id.* at 226 & n.3.[11]

3. As the foregoing discussion indicates, this Court's clear pronouncements in *Moss* v. *Ramey* and *Scott* v. *Lattig*, although adhered to by the Seventh and Ninth Circuits, have been eroded by recent decisions of other courts of appeals, and the law governing unsurveyed islands has now fallen into serious disarray. The Tenth Circuit's decision in this case confuses the matter still further. As we explain below, that court failed to appreciate three fundamental principles that govern federal conveyances of public

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[11] The government petitioned for rehearing in *Wolff*, but the Sixth Circuit reaffirmed its prior ruling. 974 F.2d 702, 703-706 (1992). The court also distinguished *Severson*, *Ritter*, and a prior Sixth Circuit case, *United States* v. *Boyd*, 458 F.2d 1252 (1972). The court of appeals concluded that *Severson* involved islands that "were large enough relative to the patented littoral lots to create an inference that the United States did not intend to divest itself of the islands when it conveyed the littoral land." 974 F.2d at 705. It distinguished *Ritter*, which involved islands comparable in size to the Lake Arbutus Island, on the ground that the "islands had been left unsurveyed due to a surveyor's error." *Ibid.* And it distinguished *Boyd*, which cited *Scott* v. *Lattig* approvingly, on the ground that "the failure to survey the island was a mistake" and that the island "might have been of some value to the government." *Ibid.*

land to private parties: (a) Congress has the sole power to determine the conditions under which public lands shall be conveyed; (b) Congress has consistently specified that public land cannot be conveyed into private ownership until the land has been identified and marked in accordance with the government's rectangular survey system; and (c) if there are ambiguities over the scope of the conveyance, they are resolved in favor of the sovereign. The practical effect of the court's decision is to convey public land to private parties who did not pay for its purchase.

a. Since the Nation's beginnings, Congress has had exclusive power over the public domain. The Framers of the Constitution explicitly granted Congress that power through Article IV of the Constitution, which provides in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, § 3, Cl. 2.[12]

As this Court has explained, Article IV grants Congress "plenary power" to retain and dispose of public lands. *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 201 (1987). Accord, *e.g.*, *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S.

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[12] That principle predated the Constitution. The Continental Congress recognized in 1780 that unappropriated lands ceded to the United States "shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them." 18 J. Continental Cong. 915 (1780). See also 26 J. Continental Cong. 277 (1784).

572, 580 (1987); *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871). Both the Executive and Judicial Branches are obligated to respect Congress's directions with regard to grants of public lands. See, *e.g.*, *Lee Wilson & Co.* v. *United States*, 245 U.S. 24, 32 (1917); *Easton* v. *Salisbury*, 62 U.S. (21 How.) 426, 431 (1858).

This Court has accordingly recognized that the construction of a public land grant rests on federal law. The Court articulated that principle in *United States* v. *Oregon*, 295 U.S. 1 (1935), stating:

> The laws of the United States alone control the disposition of title to its lands. * * * The construction of grants by the United States is a federal not a state question, * * * and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. * * *

Id. at 27-28. Accord *California* v. *United States*, 457 U.S. 273, 278-283 (1982); *Hughes* v. *Washington*, 389 U.S. 290, 292-293 (1967).

b. Congress has provided that private parties may acquire legal ownership of public lands through a federal patent, "which, under the laws of Congress, passes the title of the United States." *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) at 102; see *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 516-517 (1839). Since the framing of the Constitution, Congress has consistently followed the practice—first laid down by the Continental Congress in the Land Ordinance of 1785—of requiring that public lands be surveyed

before they are conveyed by patent to private parties.[13]

This Court recognized the significance of the survey requirement as early as 1827, explaining that public lands "are first surveyed, then advertised at public auction, and then, whatever remains unsold at public auction, is offered at private sale to the first applicant, at stipulated prices." *Chotard* v. *Pope*, 25 U.S. (12 Wheat.) 586, 588 (1827); see *Eldred* v. *Sexton*, 86 U.S. (19 Wall.) 189, 195 (1873); *Brown's Lessee* v. *Clements*, 44 U.S. (3 How.) 650, 663 (1845). The Court has consistently required compliance with the congressionally prescribed mechanism for sale, stating:

> No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local land office.

Buxton v. *Traver*, 130 U.S. 232, 235 (1889). The Court has accordingly held in a variety of contexts that, until surveyed, a tract of public land remains unidentified, and therefore not subject to sale or disposition. See *United States* v. *Wyoming*, 331 U.S. 440, 443-444 (1947); *United States* v. *Northern Pac. R.R.*, 311 U.S. 317, 344 (1940); *United States* v. *Morrison*, 240 U.S. 192, 199-201 (1916); *United States* v. *Montana Lumber & Mfg. Co.*, 196 U.S. 573, 577-578 (1905); see also *Andrus* v. *Utah*, 446 U.S.

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[13] See, *e.g.*, Act of May 18, 1796, ch. 29, § 4, 1 Stat. 466; Act of Apr. 24, 1820, ch. 51, § 1, 3 Stat. 566; Act of Sept. 4, 1841 (General Preemption Act), ch. 16, § 10, 5 Stat. 455; Act of May 20, 1862 (Homestead Act), ch. 75, § 1, 12 Stat. 392; Act of Mar. 3, 1891, ch. 561, § 13, 26 Stat. 1100.

500, 506-507 (1980) (title to school sections does not vest in the State until surveyed).[14]

Congress adopted the requirement that a survey must precede the sale to promote a rational and uniform policy for disposition of public lands. As Congress recognized from the outset of public land sales, completion of a survey prior to sale provides certainty with respect to the lands actually conveyed, reduces boundary disputes, and promotes evenhanded distribution of public lands among the private settlers. See C.A. White, *supra*, at 11. A survey is an indispensable first step in disposition because it determines and marks the boundaries of the lands that are available for sale. As the Court has explained: "A survey of public lands does not *ascertain* boundaries; it *creates* them." *Cox* v. *Hart*, 260 U.S. 427, 436 (1922) (emphasis in original).

Federal patents specifically rely on the official survey to locate and define exactly what upland the federal patent conveys. See *Horne* v. *Smith*, 159 U.S. 40, 45 (1895) ("The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."); accord *Niles* v. *Cedar Point Club*, 175 U.S. 300, 305-306 (1899). In addition, the survey ascertains the precise number of acres purchased, which the United States must know at the time it

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[14] In the past, Congress occasionally allowed private parties to enter public lands prior to survey. Even then, a settler who entered the land could obtain legal title only through a patent, and the settler could not obtain a patent until the government completed a survey of the settled lands. See, *e.g.*, *Scott* v. *Lattig*, 227 U.S. at 240-241; C.A. White, *supra*, at 100, 132, 155.

issues the patent in order to determine the total price for the land and to ensure compliance with statutory acreage restrictions.[15]

c. The principle that the survey defines what land is conveyed is especially significant in the light of the federal rules governing the construction of federal patents. This Court has repeatedly recognized

> the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

Watt v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983); see, *e.g.*, *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957); *Caldwell* v. *United States*, 250 U.S. 14, 20 (1919); *Northern Pac. R.R.* v. *Soderberg*, 188 U.S. 526, 530 (1903); *United States* v. *Arredondo*, 31 U.S. (6 Pet.) 691, 728 (1832). Thus, because federal patents rely on the official survey to identify the conveyed land, a federal patent cannot grant private parties unsurveyed land.

The Court's decisions in *Moss* v. *Ramey* and *Scott* v. *Lattig* recognize and apply that principle. As those cases indicate, a federal patent that conveys riparian land but fails to mention unsurveyed islands in the

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[15] Congress has traditionally sold public lands at a specified price per acre. See Rev. Stat. § 2357 (1875 ed.). In many instances, Congress has imposed limitations on the total acreage that may be conveyed to each qualifying entryman. See, *e.g.*, Act of May 20, 1862 (Homestead Act), ch. 75, 12 Stat. 392 (limiting homestead grants to 160 acres); cf. *Bryant* v. *Yellen*, 447 U.S. 352, 368-369 (1980) (discussing acreage limitations under the reclamation laws).

adjacent stream is not "ambiguous." The patent, as a matter of federal law, simply does not convey the unsurveyed land. That has been the consistent understanding of the Executive Branch since 1824. See, *e.g.*, BLM, *Manual of Surveying Instructions* § 3-122 (1973); *Emma S. Peterson*, 39 Pub. Lands Dec. 566 (1911); C.A. White, *supra*, at 81 (quoting 1824 correspondence from the Commissioner of the General Land Office to the Surveyor General); see also *id.* at 98 (quoting similar 1839 correspondence). Indeed, the precise terms of the patents involved here gave the patentees no reason to believe that the patents included the unsurveyed islands.[16]

Thus, the patents under which respondents claim are not ambiguous with respect to title to the islands. The court of appeals thought differently, App., *infra*, 8a, but that supposed ambiguity should have led the court to adhere to "the established rule that land grants are construed favorably to the Government," *Western Nuclear*, 462 U.S. at 59, and to hold that the United States retained title to the unsurveyed islands. The court of appeals instead erroneously concluded that in the "select area" of controversies over the extent of a riparian patent, "federal law directs a court to look to state law to resolve the dis-

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[16] The patents, which were issued under the Act of April 24, 1820, as amended, each conveyed a fractional surveyed section that was identified by its rectangular survey coordinates and the contained acreage. The patents conveyed the land for a set price per acre and measured the surveyed acreage to within hundredths of an acre. Because the unsurveyed islands (which have since been determined to range in size from 7 to 67 acres) had not been meandered at that time, they could not have been included in the measured acreage. Thus, the patents indicated that each patentee paid for and received a specific amount of land that did not include any unsurveyed islands in the adjacent stream.

pute." App., *infra*, 9a. The court mistakenly relied on a series of past decisions that addressed the special rules that apply to ownership of *submerged* lands. See *ibid.*

The States have an historically rooted sovereign interest in submerged land beneath inland navigable water, which becomes property of the States upon their admission to the Union. See, *e.g.*, *Utah Div. of State Lands*, 482 U.S. at 195-198. Congress has accordingly adhered to special principles respecting title to inland submerged land, which are embodied in the Equal Footing Doctrine, see *ibid.*, and reflected in the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.* But as this Court has explained, those principles are not applicable to islands. The Court stated in *Texas* v. *Louisiana*, 410 U.S. 702 (1973):

> It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. * * * But the rule does not reach islands or fast lands located within such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise. That was the express holding of *Scott* v. *Lattig*, *supra*.

Id. at 713 (citations elided). Although the *Texas* decision addressed islands in navigable waters, the same distinction applies in the case of islands in non-navigable waters, where the States have no claim under the Equal Footing Doctrine to ownership of the streambed. See *Scott* v. *Lattig*, 227 U.S. at 244-245.[17]

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[17] As *Texas* v. *Louisiana* indicates, an issue may arise in a particular case whether the land masses in question are truly islands of "stable formation" and not simply temporarily

4. Congress is free to alter the established rule that the United States retains title to unsurveyed islands. Significantly, Congress has done so in only one limited respect. In 1976, Congress authorized the Secretary of the Interior to convey unsurveyed islands to States or political subdivisions, explicitly adding that "[t]he conveyance of any such island may be made without survey." FLPMA § 211, 43 U.S.C. 1721. Congress's creation of that express and limited exception—involving only conveyances to government entities—demonstrates Congress's understanding of the continued vitality of *Moss* v. *Ramey* and *Scott* v. *Lattig*. The court of appeals' decision in this case departs from that understanding and provides an unauthorized windfall to riparian land owners. This Court should review that decision and restore certainty and predictability to this important body of law.

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exposed portions of the streambed. See *Moss* v. *Ramey*, 239 U.S. at 546. The BLM made that factual inquiry in this case, and the IBLA, the district court, and the court of appeals all agreed that the lands in question are islands. Because they are islands, they should be treated like other uplands, and they are not governed by the special rules that apply to submerged lands. See *ibid.*; *Scott* v. *Lattig*, 227 U.S. at 244; *Mission Rock Co.* v. *United States*, 109 F. at 769-770.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-1298

EDWARD H. KOCH, WALTER B. LEMON, ROBERTA A. LEMON, EDWARD N. JUHAN, ANTHONY F. ZARLENGO, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR, INTERIOR BOARD OF LAND APPEALS (THE), BUREAU OF LAND MANAGEMENT, DEFENDANTS-APPELLANTS

Jan. 31, 1995

Rehearing Denied April 13, 1995

Before: TACHA and BARRETT, Circuit Judges, and CAMPOS, Senior District Judge.*

TACHA, Circuit Judge.

This appeal results from a dispute over the ownership of six land masses on the Colorado River. Plain-

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* The Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

tiffs claim ownership of the lands through patents granted by the United States; the United States contends that the "islands" remained public lands following the execution of the patents. The case originated in the Interior Board of Land Appeals (IBLA), which ultimately ruled in favor of the government. Plaintiffs then filed suit in federal court. The district court reversed the IBLA's decision, granting summary judgment in plaintiffs' favor. The government now appeals. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

In 1889 and 1891, Peter Crutchfield and George House surveyed the area surrounding the land masses in question (in shorthand, the "islands"). The surveyors described each island in their field notes and identified them on the plats prepared from their notes. Crutchfield and House never meandered the islands, however, so that the islands remained officially unsurveyed. The United States patented the surveyed land adjacent to the Colorado River, incorporating by reference the relevant plats and field notes. Plaintiffs now claim ownership of these islands through the chain of title from these patents.

In 1982 the Bureau of Land Management (BLM) announced that it would survey nine islands along the same stretch of the Colorado River. The BLM determined that, although those nine islands existed at the time of the original survey, they had not yet been meandered. The BLM announced in 1987 that it would file in its Colorado office the survey plats that included the islands, indicating that the BLM

believed that the islands belonged to the federal government.

Several individuals protested the proposed filings, asserting ownership of the islands deriving from the patents to the lands adjacent to the river. The Colorado State Director of the BLM dismissed the protests, asserting that the United States owned the islands because they were previously unsurveyed.

Plaintiffs claiming ownership to six of the nine islands appealed to the IBLA.[1] The parties then entered into a number of stipulations before the Administrative Law Judge (ALJ). Under these stipulations, the parties agreed that the surveys were performed properly, that this portion of the Colorado River was non-navigable, and that the reason these six islands were not originally surveyed was that they were of little value. After a hearing, the ALJ ruled in favor of plaintiffs, holding that the islands "passed with the patent to the uplands adjacent to the parcels." On appeal, the IBLA reversed the ALJ's decision. It reasoned that the United States was authorized to survey the lands because the islands were well-defined bodies of public land omitted from the original survey.

Plaintiffs appealed to federal court, asserting subject matter jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The same stipulations that had been placed before the IBLA were put into evidence in district court. While accepting the IBLA's factual findings, the district court re-

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[1] Because persons claiming ownership to three of the islands did not appeal to the IBLA, those islands are not a subject of this action.

versed the IBLA's decision. The court concluded that the land masses were islands, that state law should govern the construction of the patents, and that state law vested title in plaintiffs, 824 F.Supp. 996.

The government now appeals to this court, alleging that the district court erred in failing to apply the following rules of law: a patent from the United States does not pass title to an island existing when the survey was made; unsurveyed land cannot be conveyed; government grants must be clear and unambiguous; and the government cannot be bound by estoppel.

II. STANDARD OF REVIEW

This case results from an administrative proceeding. As a reviewing court, our task is to determine the legal principles underlying the rights of riparian land owners against the United States. Because the legal determination does not depend on the agency's interpretation of a statutory provision, *cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984), we review these questions of law *de novo*, *see Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir.1991); *United Transp. Union v. Dole*, 797 F.2d 823, 828 (10th Cir.1986). We review the IBLA's factual findings deferentially, upholding the findings as long as they are supported by substantial evidence in the record as a whole. *See Arkansas v. Oklahoma*, 503 U.S. 91, 108, 112 S.Ct. 1046, 1060, 117 L.Ed.2d 239 (1992); *Monfort, Inc. v. NLRB*, 965 F.2d 1538, 1540 (10th Cir.1992).

As we noted earlier, the parties agreed to a number of stipulations. While this court will honor stipulations regarding factual issues, *see, e.g., Vallejos*

v. C.E. Glass Co., 583 F.2d 507, 510-11 (10th Cir. 1978), "[i]t is well-settled that a court is not bound by stipulations of the parties as to questions of law," *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 n. 1 (9th Cir.1986).

III. THE EQUAL FOOTING DOCTRINE

Before addressing whether the patents granted title in the islands to plaintiffs' predecessors in interest, we must determine whether the islands passed to Colorado when it became a state in 1876. If the islands passed to Colorado when it entered the Union, the United States government cannot now survey the lands as its own.

The equal footing doctrine is grounded in the idea that new states enter the Union with the same rights as the original states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230, 11 L.Ed. 565 (1845) ("The new states have the same rights, sovereignty, and jurisdiction . . . as the original states."); *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-97, 107 S.Ct. 2318, 2320-21, 96 L.Ed.2d 162 (1987). In *Pollard's Lessee*, the Supreme Court held that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard's Lessee*, 44 U.S. (3 How.) at 230. Because a new state enters the Union on "equal footing" with the original states, it acquires title to the lands under the navigable waters within its borders. *Id.; see also Texas v. Louisiana*, 410 U.S. 702, 713, 93 S.Ct. 1215, 1221, 35 L.Ed.2d 646 (1973). Therefore, if these islands are in a navigable part

of the Colorado River and are part of the stream bed,[2] they passed to the state in 1876.

The parties have stipulated, however, that these islands lie in a non-navigable portion of the Colorado River. The equal footing doctrine simply does not cause land in non-navigable waters to pass from the federal government to the state. Consequently, the State of Colorado did not acquire the islands in 1876, and the federal government held the islands as public land following Colorado's entry into the Union.

IV. THE PATENTS

We next review whether plaintiffs hold title to the land by virtue of the patents that the United States government gave to plaintiffs predecessors in interest.[3] Of course, if the federal government intended

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[2] The Supreme Court has refined the rule that lands underlying navigable streams belong to the states. Islands that are fast dry land and not part of the bed or stream do not pass to the states. *Scott v. Lattig*, 227 U.S. 229, 244, 33 S.Ct. 242, 244, 57 L.Ed. 490 (1913); *see also Texas*, 410 U.S. at 713, 93 S.Ct. at 1221 (reaffirming the holding in *Scott*); *Moss v. Ramey*, 239 U.S. 538, 546, 36 S.Ct. 183, 184, 60 L.Ed. 425 (1916) ("It was fast, dry land, and neither a part of the bed of the river nor land under water, and therefore did not pass to the state of Idaho on her admission into the Union."). The IBLA found that the land masses were islands which were fast dry land. Consequently, the land masses would not have passed to the state in 1876 even if the river had been navigable.

[3] We emphasize that the questions of whether the land passes to the state and whether it passes under the patent are analytically distinct. In their briefs, the parties conflate these issues, often using the law governing the passage of land to the state to analyze rights under the patents. The

to retain the islands as public land, then the islands remain the property of the United States. *See Oklahoma v. Texas*, 258 U.S. 574, 594-95, 42 S.Ct. 406, 414, 66 L.Ed. 771 (1922) ("If by . . . the terms of its patent [the government] has shown that it intended to restrict the conveyance . . ., that intention will be controlling."). The government's intention controls the disposition of land granted by government patent; thus, the federal government is not bound by its mistakes. *Scott*, 227 U.S. at 241-42,

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Supreme Court, though, has clearly used different modes of analysis for the two situations. *See, e.g., Oklahoma v. Texas*, 258 U.S. 574, 591-92, 42 S.Ct. 406, 413, 66 L.Ed. 771 (1922) (although the river was not navigable and therefore title did not pass to the state upon admission to the Union, the state can claim parts of the bed "incidental to its ownership of riparian lands on the northerly bank"); *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 451, 28 S.Ct. 579, 580, 52 L.Ed. 881 (1908) (analyzing "whether the title remains in the state or passed to the defendant with the land conveyed by the patent"); *Hardin v. Shedd*, 190 U.S. 508, 519-20, 23 S.Ct. 685, 685, 47 L.Ed. 1156 (1903) (explaining that the state never owned the land even though the courts look to state law to construe the patent).

Of course, this distinction does not mean that the state cannot convey title to lands that it has gained through the equal footing doctrine. *See, e.g., United States v. Mission Rock Co.*, 189 U.S. 391, 406, 23 S.Ct. 606, 609, 47 L.Ed. 865 (1903). For example, states own lands under navigable streams under the equal footing doctrine. Some states automatically grant title in that land to the riparian landowners. *See, e.g., Shedd*, 190 U.S. at 519, 23 S.Ct. at 685 ("When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore.").

33 S.Ct. at 243; *Grand Rapids & I.R. Co. v. Butler*, 159 U.S. 87, 94, 15 S.Ct. 991, 993, 40 L.Ed. 85 (1895) ("'[M]istakes, of course, do not bind the government.'") (quoting *Mitchell v. Smale*, 140 U.S. 406, 413, 11 S.Ct. 819, 822, 35 L.Ed. 442 (1891)).

Nothing in the record clearly reveals the government's intent with respect to patents affecting the islands at issue. There is no indication that the government intended to part with the islands; however, the evidence also does not support the contention that the government's failure to survey the islands demonstrated its desire to retain them. First, the patents are silent as to whether the government continued to view the islands as public lands or instead wished to convey the property. Second, the parties have stipulated that the reason that the government did not originally survey the islands was that they were of little value, suggesting that the government had no affirmative intent to retain or dispose of the islands. Finally, the geographic positioning of the islands does not clearly show the government's intent. The government patented all of the area around the island. Because the river surrounding the islands is non-navigable, the government had no access to the islands. As the government points out, however, it had other means to reach the islands, such as condemnation. We therefore find no government intent expressed by the patents either to retain or to dispose of the islands.

Given the ambiguity of the grants, the government asks this court to subject the patents to "the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor—'nothing passes but what is conveyed in clear and

explicit language.'" *Great N. Ry. Co. v. United States*, 315 U.S. 262, 272, 62 S.Ct. 529, 532, 86 L.Ed. 836 (1942) (quoting *Caldwell v. United States*, 250 U.S. 14, 20, 39 S.Ct. 397, 398, 63 L.Ed. 816 (1919)); *see also Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59, 103 S.Ct. 2218, 2231, 76 L.Ed.2d 400 (1983). But the Supreme Court has not used that interpretive technique when examining the effect of a patent on islands in adjacent waters. Instead, the Court has stated that when the government's intention is ambiguous, "it will be taken to have assented that its conveyance should be construed . . . according to the law of the state in which the land lies." *Oklahoma*, 258 U.S. at 595, 42 S.Ct. at 414.

Of course, "'[t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, . . . is necessarily a federal question.'" *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 320, 94 S.Ct. 517, 523, 38 L.Ed.2d 526 (1973) (quoting *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9 (1935)), *overruled in part by Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378, 97 S.Ct. 582, 590, 50 L.Ed.2d 550 (1977). Nevertheless, in this select area of cases, federal law directs a court to look to state law to resolve the dispute. *See Corvallis Sand & Gravel Co.*, 429 U.S. at 378, 97 S.Ct. at 590 (stating that the "Court has consistently held that state law governs issues relating to" riparian lands which did not pass under the equal footing doctrine); *Chandler-Dunbar*, 209 U.S. at 452-53, 28 S.Ct. at 581 (applying Michigan law); *Whitaker v. McBride*, 197 U.S. 510, 511-12, 25 S.Ct. 530, 531, 49 L.Ed. 857 (1905) ("It is the settled rule that the question of

the title of a riparian owner is one of local law.");[4] *Shedd*, 190 U.S. at 519, 23 S.Ct. at 685; *Grand Rapids*, 159 U.S. at 92-94, 15 S.Ct. at 992-93 (analyzing *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891), and applying Michigan law to land grant); *Jordan*, 140 U.S. at 384, 11 S.Ct. at 812 ("In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.").[5] Moreover, in cases similar to the one at bar, two other circuits have interpreted the same Supreme Court opinions as direct-

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[4] Although the government was not a party in *Whitaker*, that case illustrates the consistency with which state law is applied in this area.

[5] Compare *Moss*, 239 U.S. at 538, 36 S.Ct. at 183, where the Supreme Court first found that the islands did not pass to the State of Idaho and determined that "[t]he claim that the island passed under the patents is . . . ill-founded" without looking at state law. *Id.* at 546, 36 S.Ct. at 184.

Moss presents a different situation than our case. In *Moss*, the islands were left unsurveyed by mistake. *Id.* "The field notes and plat represented the survey as extending to the river, but made no mention of the island." *Id.* at 545, 36 S.Ct. at 184. In such a case, the Supreme Court found that the government intended to retain the island. *Id.*; *accord Wolff v. United States*, 967 F.2d 222, 225 (6th Cir.) (reading *Moss* as representing "the familiar concept that the intent of the United States, express or implied, governs the scope of the land grants"), *reh'g denied*, 974 F.2d 702 (1992). This reading of *Moss* is further reinforced by placing it in its chronological context. The Court's decision in *Oklahoma*, 258 U.S. at 574, 42 S.Ct. at 406, coming six years after *Moss*, once again applied state law to determine the rights of a riparian land owner. *Id.* at 595, 42 S.Ct. at 414.

ing the court toward state law. *See Wolff v. United States*, 967 F.2d 222, 234 (6th Cir.), *reh'g denied*, 974 F.2d 702 (1992); *Bourgeois v. United States*, 545 F.2d 727, 731 (Ct.Cl.1976) ("[W]e hold that if the intent of the grantor is ambiguous and the Government grants shoreland along non-navigable waters, it also passes title to islands according to the law of the state in which the property is located.").[6] We therefore look to Colorado state law to ascribe rights in the property at issue here.

"The general rule of law followed in Colorado is that a deed conveying land bordered by a non-navigable stream includes the bed to the center." *More v. Johnson*, 193 Colo. 489, 568 P.2d 437, 439 (1977); *see also United States v. Goodrich Farms Partnership*, 947 F.2d 906, 908 (10th Cir.1991); *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025, 1027 (1979). This rule conforms to the common law rule for non-navigable waters. *See Jordan*, 140 U.S. at 383-84, 11 S.Ct. at 812. We therefore conclude that Colorado would follow the common law rule for islands in the river, which holds that "all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current." *Id.* at 384, 11 S.Ct. at 812; *see also Grand Rapids*, 159 U.S. at 92-93, 15 S.Ct. at 992-93. The government does not dispute that the islands fall between the mainland and the center thread of the current and has there-

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[6] *But see Ritter v. Morton*, 513 F.2d 942, 946 (9th Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 362, 46 L.Ed.2d 281 (1975); *United States v. Severson*, 447 F.2d 631, 634-35 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039, 92 S.Ct. 716, 30 L.Ed.2d 731 (1972).

fore waived the issue. Thus, applying Colorado law, we hold that plaintiffs own the islands in question.

V. ATTORNEY'S FEES

Plaintiff's also ask for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A). That provision allows courts to award fees to a "prevailing party" in an action brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* A party must seek the fee award "within thirty days of final judgment in the action." *Id.* § 2412(d)(1)(B).

In this context, a final judgment "means a judgment that is final and not appealable." *Id.* § 2412(d)(2)(G). In other words, "[t]he 30-day EAJA clock begins to run after the time to appeal . . . has expired." *Melkonyan v. Sullivan*, 501 U.S. 89, 96, 111 S.Ct. 2157, 2162, 115 L.Ed.2d 78 (1991). We must therefore determine whether we can reach the merits of the attorney's fees question even though either party could appeal this decision (i.e., by applying for certiorari to the Supreme Court).

In *Melkonyan*, the Supreme Court left open the question of whether a party can ask for fees "at any time *up to* 30 days after entry of judgment, and even before judgment is entered, as long as he has achieved prevailing party status." *Id.* at 103, 111 S.Ct. at 2165. The Court, however, has subsequently resolved this issue. In *Shalala v. Schaefer*, —— U.S. ——, 113 S.Ct. 2625, 125 L.Ed.2d 239 (1993), the district court had never entered the judgment by filing a

separate document as required by Fed.R.Civ.P. 58, so the time for filing an appeal of the district court's decision technically had not run. The Court held that the plaintiff was nevertheless entitled to file for attorney's fees. *Id.* at ——, 113 S.Ct. at 2632. *Schaefer* therefore makes clear that a plaintiff may ask for attorney's fees even when the time for appeal has not elapsed. Thus, we hold that plaintiffs' request before this court is timely, and we will examine the merits of their attorney's fees claim.

To repeat, plaintiffs are not entitled to attorney's fees if the government's position is "substantially justified." In this context, "substantially" means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2554, 101 L.Ed.2d 490 (1988); *see also Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988). While the ruling of other courts are not dispositive of whether the government's position is substantially justified, "a string of losses can be indicative; and even more so a string of successes." *Pierce*, 487 U.S. at 569, 108 S.Ct. at 2552.

In this matter, the law of this circuit was unclear before this case. In addition, other circuits had disagreed over whether state law applied under these circumstances. *Compare Wolff*, 967 F.2d at 222, and *Bourgeois*, 545 F.2d at 727, *with Ritter*, 513 F.2d at 942, *and Severson*, 447 F.2d at 631. We therefore hold that the position of the United States was substantially justified in this case, and plaintiffs are not entitled to attorney's fees under the EAJA.

VI. CONCLUSION

Federal law instructs the court to apply state law to ascribe title under the circumstances of this case. Because Colorado law would vest title in plaintiffs, we hold that plaintiffs are the rightful owners of the islands. The government's position in this case was substantially justified, however, so plaintiffs are not entitled to attorney's fees under the EAJA. The decision of the district court is therefore AFFIRMED.

APPENDIX B

[LOGO]

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
COLORADO STATE OFFICE
Lakewood, Colorado 80215-7076

[Jul. 28, 1988]

Certified Mail

Kenneth Balcomb, Esq.
P.O. Drawer 790
Glenwood Springs, Colorado 81602

Dear Mr. Balcomb:

This letter responds to the protest you submitted for the following: Exxon Corporation and Battlement Mesa dated March 8, 1988; Edward H. Koch, Edward N. Juhan, Anthony Zarlengo, Flora Dere, Walter B. Lemon and Roberta Lemon, dated March 8, 1988; and Richard E. Looney, Daisy B. Looney and Jan Ertl, dated March 19, 1988.

All of the above protests have common issues concerning surveys executed by this office along the Colorado River in the reach between DeBeque to New Castle, Colorado. I have, therefore, joined them in this response.

Your STATEMENT IN SUPPORT OF PROTEST FOR EDWARD H. KOCH, EDWARD N. JUHAN AND ANTHONY ZARLENGO, FLORA DERE, WALTER B. LEMON AND ROBERTA A. LEMON was the source document in preparing this response

to the above protestants, and fully explains the following decisions concerning all of the protests.

Decision

The Bureau of Land Management (BLM) hereby dismisses the protests to acceptance of the surveys of nine islands. The United States claims ownership of the islands because they are islands not previously surveyed which were in existence at the time of the original survey of the surrounding lands. At the time of the original survey, it was the Government's policy to avoid the expense of surveying islands, as it was not cost effective. That policy also contemplated that when surveying such islands becomes cost effective, the Government will do so. We note also that BLM surveyors examined other islands at the same time and decided not to claim those islands because of insufficient evidence to support a finding of their existence at the time of the original survey.

The following are more detailed responses to the protestants' allegations.

1. I hereby deny your clients' protests of the filing of the plats of survey in Townships 6 and 7 South, Range 95 West and Township 8 South, Range 96 West, Sixth Principal Meridian, Colorado, all approved on September 21, 1987.

2. I hereby deny your clients' protests of the Investigative Report on the Omitted Islands in Township 6 South, Range 92 West, Township 7 South, Range 96 West, Township 8 South, Range 96 West, Sixth Principal Meridian, Colorado, dated April 10, 1987.

3. I hereby affirm your protest of the Report on Navigability of Colorado River in the reach of De-

Beque to New Castle, Garfield County, Colorado, undated, but transmitted to the Colorado State Director by memorandum dated November 20, 1984, to the extent that the position of the Bureau of Land Management is that this stretch of the Colorado River is nonnavigable.

I call your attention to the provisions relating to an appeal from this response, as they are set out in Subpart E of the Department's regulations at 43 CFR 4.400 *et seq.* (October 1, 1984), including particularly 43 CFR 4.410 and 4.411. If an appeal is taken or claimed, the Notice of Appeal must be filed with this office so that the case file can be transmitted to the Interior Board of Land Appeals, U.S. Department of the Interior. To avoid summary dismissal on the appeal, there must be strict compliance with the regulations, and the Appellant will have the burden of proving that error was committed in the Bureau survey. We also call your attention to 43 CFR 4.413, which requires the Appellant to serve a copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs on the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225.

If any appeal is taken, you are allowed 30 days from the date of receipt of this letter to file your Notice of Appeal with this office.

Sincerely,

/s/ Neil F. Morck
NEIL F. MORCK
State Director

APPENDIX C

[LOGO]

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

HEARINGS DIVISION
6432 Federal Building
Salt Lake City, Utah 84138-1194
(Phone: 801-524-5344)

December 21, 1989

IBLA 89-1

(CO-942, Group 719)

Protest on Survey

EXXON CORPORATION and BATTLEMENT MESA, INC., EDWARD H. KOCH, EDWARD N. JUHAN, and ANTHONY ZARLENGO, WALTER B. LEMON, and ROBERTA LEMON, RICHARD E. LOONEY, DAISEY B. LOONEY and JAN ERTL, and FLORA DERE, APPELLANTS

v.

BUREAU OF LAND MANAGEMENT, RESPONDENT

DECISION

Child, Judge.

Statement of the Case

Appeal from decision of Colorado State Director, Bureau of Land Managament (BLM) dated July 28, 1988, denying protests concerning a BLM tract segregation survey in T. 6 S., R. 95 W.; T. 7 S., R. 95 W.; and T. 8 S., R. 96 W., Sixth Principal Meridian, Colorado. Appellants claim ownership and allege BLM erred in claiming by resurvey "islands" in the Colorado River. The State Director concluded that the "islands" were in existence at the time of the original surveys, but were "omitted" from those surveys.

Appellants requested a hearing which was granted by Order of the Interior Board of Land Appeals entered March 14, 1989.

The Issues:

The issues to be here determined are:

A. Were the parcels in question "islands" at the time of the original survey?

B. Were the parcels in question "omitted" from the original survey?

C. Are the parcels in question property of the United States?

The matter came on regularly for hearing at Glenwood Springs, Colorado, on the 13th, 14th, 15th and 16th days of June 1989. At the outset of the hearing, the parties placed into the record a 16 page stipulation (Stipulation) duly executed by the attorneys for the parties, which stipulation was not marked as an exhibit, but rather was incorporated into the file.

The parties were requested to submit post hearing proposed findings of fact and conclusions of law and briefs in support of their respective positions and have done so. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent they are not so consistent, they are rejected.

Statement of the Facts

This case involves an approximately 15 mile stretch of the Colorado River roughly midway between Glenwood Springs and Grand Junction, Colorado, hereinafter referred to as "the reach." This reach flows between Rifle and DeBeque, Colorado. The parties have stipulated that the Colorado River at the reach in question is a non-navigable stream. (Stipulation, III, D, 6)

Over a period of approximately three centuries commencing about 500 years ago the reach was influenced by an occurrence high in the adjacent mountains commonly referred to as the little ice age. During that period there was considerable glacial erosion caused by expansion of the Alpine Glaciers in the Rocky Mountain. This glacial erosion yielded large amounts of sediment, the onslaught of which tended to widen the Colorado River channel. This action provided a relatively high percentage of sediment transported as bed material which was fairly coarse as opposed to sediment suspended in the flowing waters which is generally made up of medium sand to silt and clay. The net effect of this little ice age was to cause a channel in the vicinity of the reach that was braided in its morphology.

Since the cessation of the little ice age in the late 1700's, the onslaught of coarse sediment has been no longer available for transport and the Colorado River at that point became a stream much more typical of what one would find in the midwest or elsewhere.

The tendency of the River in modern times is to try to narrow some of the braiding which was present two or three hundred years ago.

The bottomland of a stream valley, referred to as the floodplain, is formed of alluvium, being the sediment that has been deposited over time by the stream and the surface of the floodplain is generally conformable to the level of the two-year flood.

The land masses within the reach have matured within the River to a degree that they have a morphology very similar to the floodplain and an elevation identical thereto. The same processes that formed the floodplain itself formed these land masses within the reach, but these land masses have been separated from the floodplain by an anabranch of the stream, i.e., a secondary channel of a multiple thread stream.

In the vicinity of the reach, the Colorado River can be said to be in a state of semi-disequilibrium, still showing the after effects of the glaciation. The tendency over time is for the anabranches of the channel to be resolved and the land masses within the river to become attached to the floodplain to the end that the river will become a single thread stream. Thus, this reach of the Colorado River is in the process of healing itself from an unstable stream to a stable, single-thread fluvial system.

Typically these land masses are not the result of water cutting a channel, but rather they are the result of

sediment being caught by an obstruction of some sort on the river bed followed by depositions of material on the lee side of that obstruction which deposition grows over time until, through a process of accretion, the land mass achieves a height or elevation comparable to the floodplain adjacent to the river.

The process of the anabranches of the river resolving themselves and the land masses becoming affixed to the floodplain at the sides of the river would tend to be accelerated by the dynamics of water diversion or storage upstream, or other reductions of flood peaks with the resulting reduction of annual scarring in the secondary channel. Accumulated sediment being allowed to remain, with vegetation resulting, would increase the pace of the healing process. Such accelerating factors have occurred in the instant case. (Tr. 119, 122, 147, 156-159, 360-373)

In the latter fifth of the nineteenth century, the Federal Government undertook to survey the lands across which this reach of the Colorado River flowed. These original surveys were conducted pursuant to contracts which required the individual surveyors to post a bond for at least double the estimated amount to have been due upon the completion of the contract. Upon the individual surveyor's certification of completion of his survey, his field notes were examined and approved by the United States Surveyor General and a plat thereof was prepared by the Department of the Interior and certified by the United States Surveyor General to be strictly conformable to the field notes of the individual surveys. None of these surveys were approved until they were found to have been in exact

accordance with the instructions governing them. (Stipulation, III, B, 1)

It is stipulated by the parties that these original surveys were accepted as having been completed in exact conformance with the applicable instructions and that they were neither fraudulent nor erroneous. (Stipulation, III, D, 5 and 7)

The first survey touching upon this reach of the Colorado River was performed by Deputy Surveyor Williamson in October, November and December of 1883 and January of 1884. U.S. Deputy Surveyor Henry E. Simon performed the next such survey in March and April of 1885. Again in October and November of 1886 and October of 1887 the third such original survey was performed by U.S. Deputy Surveyor Benjamin F. Clark. None of these three surveys involved the uplands now owned by appellants herein or the land parcels subject of this proceeding.

In the Williamsen survey only small portions of the River were involved and even those portions were not meandered. Surveyor Simon meandered only the right bank of the River and made no mention of "islands" in his field notes. Simon's survey was examined in the field, reported as having been correctly surveyed and accepted as having been conducted in exact accordance with the applicable instructions by the Commissioner of the General Land Office on March 2, 1887. The original plat of this township surveyed by Simon, nonetheless, reflects the existence of four "islands." Subsequent patents to these lands were issued by the United States without reference to the

meandered bank of the River, any "islands" or the River itself. Finally, Deputy Surveyor Clark in following his instructions meandered both banks of the Colorado River as it crossed the Townships he was charged with surveying and being instructed as he was to meander all islands in the River, he meandered five islands and noted the existence of approximately eleven topographical objects lying between the meander lines of the River. (Stipulation, III, B, 2, 3 and 4).

The fourth and fifth original surveys touching upon this reach of the Colorado River were performed by U.S. Deputy Surveyors Peter Churchfield during the period of October and November 1889 and George W. House in June of 1891. These last two surveys involved the uplands now owned by the appellants and among others, the lands parcels subject of this proceeding. The Churchfield surveys were governed by the 1855 Manual of Surveying Instructions, The Instruction of June 1, 1864, The Instructions of May 3, 1881, The Annual Instructions of July 25, 1884, and Special Instructions dated July 22, 1889. The House survey was governed by the 1890 Manual of Survey Instruction and Special Instructions dated April 20, 1891. (Stipulation, III, B, 5 and 6)

The Churchfield survey resulted in two islands being meandered (neither is among the parcels here in dispute) and notation of approximately fifteen topographical objects lying between the meander lines of the river. Although Surveyor House noted four land masses between the meander lines of the River he meandered no islands.

Fairly summarized it can be said that the instructions governing the original surveys required all islands between the surveyor established meander lines of the Colorado River to be meandered. Those instructions also required the deputy surveyor to take field notes in which he was to exercise "the utmost care * * * to pass no object of topography * * * without giving a particular description." The surveyor was instructed to "make a faithful, distinct and minute record of everything done and observed" and to present as far as possible a full and complete topographical description of the country surveyed and to render sketches thereof in relation to the survey lines he was establishing. (Stipulation, III, C) That the surveyors did note these topographical factors is demonstrated by the fact that many land masses or parcels in the river showed upon the original plats although they were not meandered as islands in the surveys.

With respect to the parcels here contested, the field notes of the U.S. Deputy Surveyors indicate the following:

Parcel 9—a "bar or low islands." (Exhibit G-3)

Parcel 10—a "long low island, overflowing and unfit for cultivation." (Exhibit G-3)

Parcel 14—a "low overflowing island." (Exhibit G-28)

Parcel 20—A "large island." (The original plat made from the survey and field notes of Deputy Surveyor House suggests this parcel may have been three parcels in 1891) (Exhibit G-29)

Parcel 20A—a "small island." (Exhibit G-29)

Parcel 21—an "island." (Exhibit G-29)

Parcel 22—a "gravel bar." (Exhibit G-29)
(Stipulation, III, D)

Due to mineral development in the area and respondent's classification of the area as an "area of critical environmental concern," the BLM began an investigation in 1982 to determine the ownership of many "islands" in the Colorado River between Grand Junction and Glenwood Springs. (Respondent's Posthearing Brief, pp. 1, 2)

In the investigation, the respondent investigated 22 parcels which had not been meandered in the original survey and of those 22 parcels, claimed ownership to 9 parcels, 6 of which are subject of this action. (Tr. 10) Ownership of these six parcels is claimed by respondent under the following theory:

> * * * These islands were omitted from the original surveys in 1889 and 1890 because they could not be economically surveyed. Because unsurveyed, omitted land may not be legally transferred from Federal ownership, these six islands remain public lands owned by the United States.

(Respondent's Posthearing Brief, p. 1)

BLM issued its decision accepting its survey performed between 1982 and 1987 which in effect asserts Federal ownership of the nine parcels, including the six parcels subject of this action. Appellants, as owners of the riparian uplands adjacent to said six parcels, protested the said decision issued by the Colorado State Director of BLM and appealed from a denial of that protest.

At the request of appellants, the matter was referred by the Interior Board of Land Appeals to the Hearings Division for a hearing and this decision which shall be final for the Department of the Interior absent a timely appeal to the Interior Board of Land Appeals.

Discussion

The parties have agreed to the following legal principles which shall be controlling for purposes of this case:

1. A Grantee of land bordering a non-navigable meandered river takes title to all submerged lands between the mainland and the thread of the river, unless expressly reserved by the United States.
2. In the absence of an express reservation of submerged unsurveyed lands, such a reservation cannot be implied.
3. The original Government Land Office plats and field notes of the areas surveyed, having been incorporated by reference in the original patents, are a part of the description of the lands granted.
4. A meander line is a traverse of the margin of a permanent natural body of water which follows the contour of such a body at mean high water. Meander lines are not run as boundaries, but are used to define the sinuosities of the river and to ascertain the quantity of land remaining after segregation of the water area.
5. An "Island" is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel.

(Stipulation, VI, p. 14)

A.

Were the parcels in question "islands" at the time of the original survey?

Messrs. Churchfield and House made note of the parcels in question, each of which appeared on the original plats prepared from their survey notes. Although they were charged and instructed to "meander" (in effect, "survey") all islands in the Colorado River as it crossed the lands they were surveying, they did not meander these parcels. Cursory inspection of the valley bottom through which this reach of the Colorado River runs would impress any rational person or surveyor that this river was in a state of constant change and the parcels within the River unstable and subject to being altered or eliminated at the whim of the river during any seasonal runoff. An examination of the many exhibits prepared and offered by the respondent cannot but impress even the casual observer that these parcels have gone through dramatic shifts, alterations and changes since the original surveys in 1889 and 1891. Single parcels have divided and multiple parcels have united. None of the parcels has shown itself to have the capacity for constancy since it was noted by the surveyors and placed on the original plat. (See particularly Exhibits G-3, G-5, G-28, G-29)

Well could the original surveyors have recognized the futility of meandering such shifting protrusions of the river bed. Well could the issuers of patents to the uplands in the vicinity of these parcels have acknowledged that these unstable parcels properly should pass with the stream bed of this non-navigable river. Under no fair interpretation of the evidence could these parcels be said to be fast, dry lands at the time of the original survey.

The definition of "island" accepted by the parties to this action which we must apply requires a "*permanent* land mass," separated from the mainland by a "*perpetual* channel." The parcels here in question have shown themselves to lack permanency. Geological evidence presented by the respondent testified to the fact that this reach of the Colorado River is in a state of "Semi-disequilibrium tending to straighten itself and remove land parcels from the course of its current. Although the court in *Ritter* v. *Morton*, 513 F.2d 942, 950 (9th Cir. 1975) viewed morphological evidence to be irrelevant, that case is distinguished from the present case, since it would appear that the court in *Ritter* was able to apply an elementary school definition of "island" and did not concern itself with the permanent nature of the land mass in question.

Likewise with respect to the channel which separates the land mass from the mainland, ours, by reason of the definition agreed to by the parties, is a more specific inquiry that that generally confronting the courts in the cases which have been cited. We here must ask ourselves, was the channel perpetual? An elementary school definition of "island" is not generally so restricted. *Webster's II New Riverside University Dictionary*, copyright 1984, currently furnished its employees by the United State Government, defines *Perpetual* as deriving from the Latin "*perpetuus*, continuous *perpes*, uninterrupted 1. Lasting for eternity: never ending * * *"

That a channel must be of water when speaking of an island in a river, lake or ocean cannot be gainsaid. Simply put, no channel would separate these parcels from the mainland (floodplain or upland) when the parcel was inundated by water during times when

the river was at flood state. Neither would the parcels be separated by a channel from the mainland when the river was at low stage which would occur seasonally or in times of drought. If, as respondent claims, a channel is a channel even when dry, it is nonethless then a dry channel and fails to separate the parcel from the upland.

The term channel is used in many ways. The drip molding on an automobile is a channel as is the rain gutter on a house. Respondent's reliance on cases discussing intermittent or seasonal water courses as channels whether flowing or dry does not shed light upon when is an island! In order for a channel to separate a land mass in a river from the uplands or mainland, it must contain water throughout its length. In order to meet the definition of island agreed to by the parties, such a channel must do so perpetually.

The parcels here in question were not permanent land masses nor were they separated from the mainland by perpetual channels. Under the definition to which the parties are bound, the parcels subject of this action were not islands at the time of the original surveys in 1889 and 1890 nor were they at the time of the hearing.

B.

Were the parcels in question "omitted" from the original survey?

The proposition of law upon which respondent relies is stated in the lead note in *Oliver Wheeler* v. *Bureau of Land Management*, 108 IBLA 296 (1989):

> An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

The two essential elements to be found to effect retained ownership by the United States under this proposition are (a) that a present island existed in its present form as "fast dry land" at the time of the original survey, and (b) error in omitting it from the original survey. See *Scott* v. *Lattig*, 227 U.S. 229 (1913) and *Moss* v. *Ramey*, 239 U.S. 538 (1916). In *Scott* and *Moss* the Court found the parcels in question to have existed as islands at the time of the original survey as fast dry lands in the same form as that existing at the time of the hearing. Since the surveyors were charged with surveying islands and recording same in their field notes and failed to so survey or to make any reference to same in their field notes and the islands failed to appear on the original plats, the Court held the omission of these islands from the survey to have been in error. Particularly was this so in *Ritter* v. *Morton*, *supra*, where the Court noted that since the original surveyor included in his survey a much smaller island in an adjoining section, but failed to make any note whatsoever of the island at issue, "In all probability, he intended to return and survey the islands at a later date." The Court held under these circumstances that it was error to have omitted the island in question from the survey, wherefore title thereto remained in the United States. Supra at pages 950 and 951.

Ritter, *Scott* and *Moss*, *supra*, contain references to circumstances where omission of land parcels within rivers from original survey does not serve to cause title thereto to remain in the United States. Such circumstances may include decision that the island was too small or of too little value. *United States* v. *Lane*, 43 S.Ct. 236 is cited by the Circuit Court in *Ritter*, supra, at page 950, for its enumeration of

factors which might excuse the survey of islands, the omission of which from the survey would not constitute error and title to which would presumably pass with riparian uplands. Such factors include the omitted lands locality, remoteness and value and the existence of any difficulties out of proportion to any possible gains in surveying.

In the case at bar the original surveyors were instructed to survey or meander all islands in the Colorado River and to carefully note all topographical features. Some islands within the river were meandered. The land parcels in question were not surveyed or meandered. However, they were noted in the field notes and appeared on the original plats. The parties have stipulated that the original surveys here in question were accepted as having been completed in exact conformance with the instructions which governed them and that the original surveys were neither fraudulent nor erroneous.

It thus appears that Surveyors Churchfield and House committed no error in omitting these parcels from their original surveys. It is apparent that they concluded that the parcels in question lacked the permanency essential to qualify as islands. It is further apparent that they recognized the futility of meandering these parcels, since a meander performed on Tuesday may well be unrecognizable on Wednesday, given the instability of the Colorado River at this juncture.

The parcels, subject of this action were not islands, omitted from the original survey; rather, they were included in the survey, but excluded as islands therefrom.

C.

Are the parcels in question property of the United States?

The cases cited by the respondent have been carefully reviewed and are generally distingiushed from the case at bar. The definition of "island" stipulated to by the parties governs this case. Here the original surveyors were charged with surveying all islands in the Colorado River along the reach in question. Here the parcels in question were noted in the field notes of the surveyors and appeared on the original plats made from those field notes. Other parcels along the reach were surveyed as islands. Finally, the parties here acknowledge the original surveys were accepted as having been completed in exact conformance with the instructions which governed them and were neither fraudulent nor erroneous.

Under the circumstances of this case, the original surveyors were justified in viewing the parcels in question not to be islands, but rather part of the shifting bed of the Colorado River. As such, they passed with the uplands on issuance of patent thereto. See *Whitaker* v. *McBride*, 197 U.S. 510 (1905).

Now having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

1. Factual findings stated elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

2. Appellants Walter B. Lemon and Roberta A. Lemon hold title to lands along the south bank of the Colorado River in Section 25, T. 6 S., R. 95 W., of the Sixth Principal Meridian through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claims by the Government as Parcel 9 in that section. (Stipulation, p. 3; Exhibit G-3)

3. Appellant Flora Dere holds title to lands along the north bank of the Colorado River in Section 35, T. 6 S., R. 95 W., of the Sixth Principal Meridian through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Parcel 10 in that section. (Stipulation, p. 3; Exhibit G-3)

4. Appellant Edward H. Koch holds title to lands along the north bank of the Colorado River in Section 7, T. 7 S., R. 95 W., of the Sixth Principal Meridian through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the eastern portion of the lands claimed by the Government as Parcel 14 in that section. (Stipulation, p. 3; Exhibit G-28)

5. Appellants Richard E. Looney and Daisey B. Looney hold title to, and appellant Jan Ertl, by virtue of a contract of purchase and sale, asserts an interest in, lands along the north bank of the Colorado River in Section 7, T. 7 S., R. 95 W., of the Sixth

Principal Meridian through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the western portion of the lands claimed by the Government as Parcel 14 in that section. (Stipulation, p. 3; Exhibit G-28)

6. Appellants Edward N. Juhan and Anthony Zarlengo hold title to lands along the south bank of the Colorado River in Section 7, T. 8 S., R. 96 W., of the Sixth Principal Meridian through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjadent to the lands claimed by the Government as the northeast portion of Parcel 20 and Parcels 20-A and 22 in that section. (Stipulation, p. 4; Exhibit G-29)

7. Appellant Exxon Corporation (Exxon) holds title to lands along the banks of the Colorado River in Section 7, T. 8 S., R. 96 W., Sixth Principal Meridian, through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as the southwestern portion of Parcel 20 and Parcel 21 in that section. (Stipulation, p. 4; Exhibit G-29)

8. Each of the parcels, subject of this action, had surface areas above the ordinary high water mark at the time of the original surveys and could therefor have been meandered.

9. None of the parcels, subject of this action, was an island at the time of the original survey as that

term is defined by stipulation of the parties. (Stipulation, VI, par. 6, p. 14)

10. The ordinary high water mark, mean high water line and vegetation line approximate the elevation along the river of the mean annual flow, which approximates the meander line. (Tr. 394, 417, 502, 514-515, 527-531)

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.

2. Conclusions of law reached and set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. The patents to the lands adjoining the Colorado River in the involved reaches contained no reservations of the disputed lands to the United States.

4. The patents to the lands adjoining the Colorado River in the involved reaches incorporate by reference the Government Land Office plats and field notes of the areas surveyed.

5. No evidence supports respondent's contention that "* * * These islands were omitted from the original surveys in 1889 and 1890 because they could not be economically surveyed." Rather the contracts for survey issued by the Government required the survey of all islands in the involved reach of the Colorado River.

6. The parcels, subject to this action, were included in the original surveys and not omitted therefrom.

They were correctly determined at the time of said surveys not to qualify as islands.

7. For purposes of this case, by reason of the agreed definition of "island" set forth in the stipulation entered into the record, a land mass rising from the bed of a meanderable body of water above the mean high water mark is not an island unless: (a) it is a permanent land mass, (b) separated from the mainland by a perpetual channel.

8. To the extent the 1982-1987 surveys represent the parcels, subject of this action, to be islands, title to which was presumably retained by the United States, they are legally and factually incorrect and the respondent's decision to so accept said surveys should be reversed.

9. Title to the thread of the Colorado River passed with patent to the uplands adjacent to the parcels, subject of this action.

Order

The parcels subject of this action, to-wit: numbers 9, 10, 14, 20, 20-A, 21 and 22 are not property of the United States and the respondent has no bona fide claim thereto. Respondent's decision to the contrary is reversed.

Dated: December 20, 1989

/s/ Ramon M. Child
RAMON M. CHILD
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).

Distribution

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APPENDIX D

[LOGO]

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

EXXON CORP., ET AL.

v.

BUREAU OF LAND MANAGEMENT

IBLA 90-199 Decided February 21, 1991

Appeal from a decision of Administrative Law Judge Ramon M. Child reversing a decision of the Colorado State Director, Bureau of Land Management, which had dismissed protests to the acceptance of surveys of certain islands in the Colorado River, and concluding that such lands were not islands omitted from the original surveys of the area. CO-942, Group 719.

Reversed.

OPINION BY
ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) appeals from a December 21, 1989, decision of Administrative Law Judge Ramon M. Child reversing a July 28, 1988, decision of the Colorado State Director, BLM, which had dismissed protests to the acceptance of

surveys of certain islands [1] located in T. 6 S., R. 95 W., T. 7 S., R. 95 W., and T. 8 S., R. 96 W., sixth principal meridian, Colorado, in the reach of the Colorado River between Rifle and DeBeque, Colorado. The Judge concluded that the surveyed land masses (which he designated "parcels") were not islands omitted from the original surveys of the area and, therefore, were not the property of the United States.

I. *Procedural and Factual Background*

The original surveys of the particular areas in question were performed in 1889 and 1891. Deputy Surveyor Peter Churchfield surveyed T. 6 S., R. 95 W., and T. 7 S., R. 95 W., in October and November 1889, and that survey was accepted on March 12, 1890. Deputy Surveyor George W. House conducted the survey of T. 8 S., R. 96 W., in June 1891, and that survey was accepted on February 23, 1892. Although neither surveyor meandered any of the land masses at issue in this appeal, they identified each land mass in their field notes and each land mass

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[1] In the protests to BLM, protestants challenged the surveys as they related to nine islands; however, certain protestants did not appeal BLM's dismissal of their protests. In addition, in its opening appeal brief, BLM indicates that Parcel 20 A is not being claimed by the United States (BLM Brief at 24 n.7; Tr. 494), as it did at page 18 of its Proposed Conclusions of Law filed with Judge Child. Nevertheless, in his decision, Judge Child addressed Parcel 20 A, ruling that it was not an island. Since it was not asserting title to that parcel, BLM did not challenge that ruling. For purposes of appeal, only six land masses, identified in the record as Islands or Parcels 9, 10, 14, 20, 21, and 22, are at issue. They contain 23.68 acres, 66.63 acres, 43.11 acres, 19.51 acres, 7.29 acres, and 7.97 acres, respectively.

appeared on the plats prepared from the field notes.[2] The United States patented the surveyed land adjacent to the Colorado River, incorporating by reference the plats and field notes of the areas surveyed.

In 1982, BLM commenced an investigation to determine ownership of 22 land masses in the Colorado River between Glenwood Springs and Grand Junction, Colorado, including the parcels at issue here.[3] After evaluating data from the original survey records, railroad survey plats prepared in 1886 and 1919, aerial photography from 1937, 1945 or 1948, 1954, 1978, and 1984, dendrochronology analyses of samples taken from trees on the various land masses, and hydrology reports, BLM determined that 9 of the 22 land masses which had not been meandered in the

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[2] Churchfield's field notes described the land masses, identified in this case as Parcel 9, located in sec. 25, Parcel 10, located in sec. 35, T. 6 S., R. 95 W., and Parcel 14, located in sec. 7, T. 7 S., R. 95 W., as a "bar or low island," a "long low island, overflowing and unfit for cultivation," and a "low overflowing island * * * bar or low island" respectively; while the House field notes characterized the land masses, identified in this case as Parcels 20, 21, and 22, located in sec. 7, T. 8 S., R. 96 W., as a "large island" (the original plat depicts this parcel as three islands), an "island," and a "gravel bar," respectively. *See* Judge Child's Decision at 6, and BLM Brief, Attachment A.

[3] The investigation was precipitated by inquiries from local landowners and oil companies concerning the ownership of the land masses. Apparently, several of the land masses contain valuable sand and gravel, and oil companies have discovered natural gas and coalbed methane along this reach of the Colorado River (BLM Brief at 2; Tr. 42-43). This area has also been classified as an Area of Critical Environmental Concern due to the existence of wildlife habitat and the area's recreational potential (BLM Brief at 2; Tr. 43).

original surveys were islands which existed at the time of the original surveys and continued to exist (*see* Exh. G-27). Based on this investigation, BLM accepted the surveys of the nine omitted islands performed between 1982 and 1987 and announced in the *Federal Register* that it would officially file the plats in the Colorado State Office on a particular date.

Prior to that date, as extended by BLM, various individuals and corporations protested that proposed action, alleging ownership of the land masses on the ground that the parcels were part of the riverbed which had passed to the original patentees of the riparian lots based on the original surveys(*see*, *e.g.*, Exh. A, attached to Exh. A-23).

By decision dated July 28, 1988, the Colorado State Director, BLM, dismissed the protests, stating that the United States claimed ownership of the land masses because they were islands omitted from the original surveys which were in existence at the time of the original surveys of the surrounding lands (Exh. G-14).

Certain protestants (claimants) appealed that dismissal to this Board and requested a hearing.[4] The

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[4] The claimants and the adjacent parcel(s) which they seek are: Walter B. and Roberta A. Lemon—Parcel 9; Flora Dere—Parcel 10; Edward H. Koch—eastern portion of Parcel 14; Richard E. and Daisey B. Looney and Jan Ertl—western portion of Parcel 14; Edward N. Juhan and Anthony Zarlengo—northeastern portion of Parcel 20 and Parcel 22; Exxon Corp.—southwestern portion of Parcel 20 and Parcel 21. *See* Decision at 12-13; Stipulation (Stip.) III. A. (1)-(6). Battlement Mesa, Inc. (BMI), filed a protest in this case asserting title to the center line of the bed of the river adjacent to riparian uplands in T. 7 S., R. 95 W., and T. 7 S., R. 96 W. *See* Exh. B, attached to Exh. A-23, at 4. It was also an appellant before

Board docketed that appeal as IBLA 89-1. By order dated March 14, 1989, the Board granted claimants' request and referred the case to the Hearings Division for assignment of an Administrative Law Judge and issuance of an initial decision, which, absent an appeal to the Board, would be final for the Department.[5]

The hearing in this case was held on June 13-16, 1989, and included a field trip to view several of the disputed land masses. However, prior to the hearing, on June 12, 1989, the parties executed a 16-page prehearing stipulation which was made part of the record at the hearing. The stipulated facts included excerpts from the relevant surveying manuals and instructions directing surveyors to meander islands and to note topographical features (Stipulation (Stip.) III. C.). The parties agreed that "[t]he surveys of the involved lands were accepted as having been completed in exact conformance with the Instructions" (Stip. III. D. 5), and that "[t]he original surveys were neither fraudulent nor erroneous"

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the Board in IBLA 89-1; however, it is unclear whether BMI still remains a party here since, at the hearing, claimants' counsel did not name BMI as one of the parties they represented. *See* Tr. 4-6.

[5] Prior to issuance of our order, claimants had filed a request with the Secretary of the Interior that he remove the case from the Board and assume jurisdiction thereof in accordance with 43 CFR 4.5. By letter dated Mar. 31, 1989, the Director, Office of Hearings and Appeals, responded to that request, informing claimants that the Secretary had declined to take personal jurisdiction of the appeal, but that he had ordered that the case be considered on an expedited basis. Accordingly, the Board has undertaken expedited consideration of this appeal. *See* Board order dated Oct. 11, 1990.

(Stip. III. D. 7). *See also* Stip. III. B. 1. Under the terms of the stipulation, claimants were to prove that the subject lands were below the ordinary high water mark of the Colorado River at the time of the original surveys and thus were a part of the riverbed (Stip. IV. 1.), while BLM had the burden of proving that those lands were islands at the time of the original surveys (Stip. V. 1.).

The stipulation also embraced various legal issues. The parties agreed to the following legal definition of "island": "An 'Island' is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel" (Stip. VI 5.). They also recognized that a legal issue remaining to be determined was "[w]hether at the time of the original surveys of the disputed lands there was in effect an official or unofficial policy of the Government not to survey islands falling within the regular course of the surveys of public lands" (Stip. VII. 1.).

At the outset of the hearing, claimants stated their position that the controversy could be resolved as a matter of law without the necessity for a hearing. They asserted that although the survey manuals and instructions mandated the meandering of all islands encountered while surveying, the original surveyors had not meandered the disputed land masses; rather they had merely noted them as topographical features. Because BLM had stipulated that the surveyors had exactly complied with their instructions and that the original surveys were not erroneous, claimants argued that BLM had, in effect, admitted that the disputed lands were not islands at the time of the original surveys (*see* Tr. 13-25).

Claimants, however, did not request a ruling on their assertion; rather, they proceeded to call three witnesses and introduce over 25 exhibits to demonstrate that the disputed parcels were below the ordinary high water mark of the Colorado River, which they equated with the mean annual flood level of the river. BLM presented the testimony of five witnesses and over 30 exhibits to support its position that the land masses were islands in existence at the time of the original surveys, and that the Government's policy at the time of the original surveys was not to survey all islands in the regular course of surveying public land. The parties filed extensive posthearing submissions including proposed findings of fact and conclusions of law.

II. *Judge Child's Decision*

In his December 21, 1989, decision, Judge Child framed three issues raised in the case: (1) whether the disputed parcels were "islands" at the time of the original surveys; (2) whether the parcels were "omitted" from the original surveys; and (3) whether the parcels were property of the United States. Then, relying on testimony presented at the hearing, he recited some geologic history of the area as it related to the river, adopting the conclusion that:

> In the vicinity of the reach, the Colorado can be said to be in a state of semi-disequilibrium, still showing the after effects of the glaciation. The tendency over time is for the anabranches of the channel to be resolved and the land masses within the river to become attached to the floodplain to the end that the river will become a

> single thread stream. Thus, this reach of the Colorado River is in the process of healing itself from an unstable stream to a stable, single-thread fluvial system.

(Decision at 3).

After accepting the parties' stipulation as controlling for the purposes of this case, the Judge addressed each of the identified issues, first determining that the land masses were not islands at the time of the original surveys. He explained:

> Cursory inspection of the valley bottom through which this reach of the Colorado River runs would impress any rational person or surveyor that this river was in a state of constant change and the parcels within the [r]iver unstable and subject to being altered or eliminated at the whim of the river during any seasonal runoff. An examination of the many exhibits prepared and offered by [BLM] cannot but impress even the casual observer that these parcels have gone through dramatic shifts, alterations and changes since the original surveys in 1889 and 1891. Single parcels have divided and multiple parcels have united. None of the parcels has shown itself to have the capacity for constancy since it was noted by the surveyors and placed on the original plat. (See particularly Exhibits G-3, G-5, G-28, G-29) [.]

(Decision at 8). He found that the evidence failed to demonstrate that the parcels were fast, dry lands at the time of the original surveys.

The Judge's resolution of this issue focused on the stipulated definition of an island which required a

" '*permanent* land mass' separated from the mainland by a '*perpetual* channel'." *Id.* He found that the disputed parcels lacked permanency because BLM's geologic evidence indicated that this reach of the Colorado River was in a state of "[s]emi-disequilibrium which would tend to straighten itself out and remove land masses from the course of its current." *Id.* He distinguished a case cited by BLM, *Ritter* v. *Morton*, 513 F.2d 942 (9th Cir. 1975), on the ground that the court in *Ritter* applied an "elementary school definition" of island "and did not concern itself with the permanent nature of the land mass in question." *Id.* at 9.

After citing the definition of "perpetual" in *Webster's II New Riverside University Dictionary*, 1984 ed., as meaning "[l]asting for eternity: never ending," he stated that the channels which separated the land masses from the mainland were not perpetual channels because no channel would separate the parcels from the mainland when the parcels were inundated by water when the river was at flood stage, nor would the parcels be separated by a channel from the mainland when the river was at a low stage and the channels were dry. He found that:

> In order for a channel to separate a land mass in a river from the unplands or mainland, it must contain water throughout its length. In order to meet the definition of island agreed to by the parties, such a channel must do so perpetually.

Id.

He concluded that, under the stipulated definition of island, the parcels were not islands at the time of the original surveys or at the time of the hearing.

Judge Child also found that the parcels were not omitted from the original surveys. He cited precedent holding that omitted islands remain public domain and may be surveyed and disposed of by the United States, but noted that in order for ownership to be retained by the United States, a present island must have existed in its present form as fast, dry land at the time of the original survey, and its omission from the original survey must have been an error. He noted that although the surveyors had meandered some islands in the river, they did not meander the disputed parcels; rather, they described them in their field notes as topographic features. He also referred to the parties' stipulation that the surveyors had conducted the original surveys in exact conformance with the governing instructions and that those surveys were neither fraudulent nor erroneous.

Judge Child, therefore, found that the original surveyors had committed no error in omitting these parcels from their surveys, suggesting that they apparently had "concluded that the parcels in question lacked the permanency essential to qualify as islands" (Decision at 11) and had recognized "the futility of meandering these parcels, since a meander performed on Tuesday may well be unrecognizable on Wednesday, given the instability of the Colorado River at this juncture." *Id.* In short, he concluded that the parcels were not islands omitted from the original surveys, but were properly included in the surveys as topographical features, not islands.

Finally, Judge Child found that the disputed parcels were not property of the United States because "[u]nder the circumstances of this case, the original surveyors were justified in viewing the parcels in question not to be islands, but rather part of the

shifting bed of the Colorado River. As such they passed with the uplands on issuance of patent thereto" (Decision at 11).[6]

Thus, Judge Child determined that the 1982-1987 surveys of the disputed parcels were legally and factually incorrect, and reversed BLM's decision accepting the surveys of Parcels 9, 10, 14, 20, 21, and 22 because those parcels were not property of the United States.

III. *Arguments of the Parties*

In its opening brief, BLM argues that the Judge ignored all the facts developed at the hearing concerning the existence of the disputed land masses at the time of the original surveys and virtually all the law on omitted islands. BLM asserts that the Judge's decision is premised on two erroneous factual findings: (1) the present parcels were not in existence as islands at the time of the original surveys and (2) the land masses are not islands because the side channels do not carry water at all times.

BLM contends that virtually all the evidence demonstrates that the parcels were, in fact, islands at the

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[6] The Judge also specifically found as facts that each of the parcels had surface areas above the ordinary high water mark at the time of the original survey and could have been surveyed, and that "[t]he ordinary high water mark, mean high water line and vegetation line approximate the elevation along the river of the mean annual flow, which approximates the meander lines (Decision at 13). Further, he found as a conclusion of law that no evidence supported BLM's contention that the parcels had been omitted from the original surveys because they could not be economically surveyed, noting that the contracts for survey required the survey of all islands in the involved reach of the Colorado River (Decision at 14).

time of the original surveys. It argues that its evidence shows that the parcels were expressly noted in the original surveyors' field notes; the parcels were all shown as islands on the original plats of survey; each parcel now has one or more trees on it which predate the original 1889 and 1891 surveys; the parcels were fast, dry land at the time of the original surveys; the parcels are all surrounded today by permanent channels, except where the channels have been filled in by the adjacent riparian landowners; and the size, shape, and location of the parcels today are in close congruence with those shown on the original survey plats.

BLM argues that these facts were clearly proven by the testimony and documentary evidence it introduced, including the testimony of two geologists: Dr. Waite R. Osterkamp, an expert in fluvial geomorphology, who testified by the morphology of the river and parcels, and opined that the parcels were all 100 to 200 years old and that their appearance had probably changed little since the surveys were performed; and Dr. Gordon C. Jacoby, an expert in dendrochronology, who discussed the dating of tree bore samples taken on the parcels and concluded that because each parcel contained at least one tree predating the original surveys, the parcels had to have been in existence at that time. BLM also asserts that the testimony of its experienced surveys, as well as the exhibits it introduced, provide further support for its position. One of those surveyors, Donald W. Ashbaugh, who conducted the 1982-87 investigation, explained at the hearing how he reached his conclusion that the parcels were islands omitted from the original surveys.

BLM discusses each parcel individually, citing the testimony and exhibits relating to the parcel's existence as an island at the time of the original surveys (BLM Brief at 15-26). It asserts that claimants produced nothing at the hearing to rebut any of its proof.[7] BLM claims that the Judge completely disregarded all of its uncontroverted evidence. Instead, BLM submits, the Judge focused solely on small portions of Osterkamp's testimony to conclude that the parcels were impermanent, while ignoring the bulk of that testimony, including Osterkamp's expert opinion that the parcels were in existence as islands in 1889 and 1891.

BLM further argues that the Judge erroneously concluded that the parcels were not islands because some of the side channels separating them from the upland did not have water in them at all times. According to BLM, the existence of the channels today has relevance only to the extent it sheds light on the condition of the parcels at the time of the original surveys. It argues that a channel is a permanent

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[7] Instead, BLM argues, claimants' evidence at the hearing focused on demonstrating that the parcels were not legally in existence in 1889 and 1891 because they were completely submerged by the river during the height of flood stage, apparently equating the ordinary or mean high water mark with peak flood waters. While BLM agrees that the parcels and most other geomorphic features in a flood plain are inundated during a flood, it insists that this fact is irrelevant since the ordinary high water mark of the river has nothing to do with peak flood waters, but is, instead, the level of the water during average flow conditions. The Judge agreed with BLM's definition of the ordinary or mean high water mark (*see* Decision at 13 and note 6, *supra*), and the meaning of this term is not an issue in this appeal.

geomorphic feature which frequently conveys water, but may sometimes be dry, citing legal authority supporting its position, which BLM claims the Judge disregarded. BLM contends that contrary to the Judge's assumption, the parties did not intend for the stipulation to mandate that the channel always be filled with water asserting that if the parties had so intended, they would have used words explicitly indicating that the channels must be filled with water at all times. Furthermore, BLM asserts, if the stipulation meant what the Judge suggested, there would have been no reason for a hearing.[8]

In short, BLM essentially argues that the Judge erred in concluding that the disputed parcels were not islands at the time of the original surveys because he overlooked the unrebutted evidence establishing their existence as fast, dry land at that time and failed to recognize that channels separating islands from the mainland need not always be filled with water. BLM stresses that it has established that the disputed parcels were islands at the time of the original surveys, and that modern case law supports its ownership of those islands. BLM requests that its original decision dismissing the protests and accepting the 1982-87 surveys of those islands be upheld.[9]

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[8] BLM also asserts that, contrary to the Judge's conclusion, it has demonstrated that it was the practice of nineteenth century surveyors not to survey nonagricultural land, including islands, in the regular course of their surveys.

[9] Attachment B to BLM's opening brief consists of a letter from Jacoby, one of BLM's witnesses, commenting on the Judge's decision. Claimants filed a motion to strike that attachment on the ground that it was an inappropriate attempt to submit additional evidence after the conclusion of the hearing. By order dated Apr. 20, 1990, we took that

In its answer, claimants argue that the detailed stipulation agreed to by the parties conclusively precludes all of BLM's arguments and permits no conclusion other than that reached by the Judge. They stress that BLM stipulated that the survey instructions directed the original surveyors to meander islands and to note topographical features; the involved surveyors exactly complied with the applicable instructions; the surveys were neither fraudulent nor erroneous; and in order to be an island, the land mass must be separated from the mainland by a perpetual channel. Claimants assert that "[i]t is unmeaningful that either Osterkamp, Jacoby, or even the Supreme Court would otherwise define an island. The definition used was taken from the 1864 Instructions to surveyors. The parties agreed on the definition for the purposes of this case and the (Judge) found it to be controlling" (Answer at 15).

Claimants contend that the only way BLM could prove that the parcels were islands at the time of the original surveys would be to show error in those surveys. Since BLM stipulated that those surveys were not erroneous, claimants argue that any attempt to show error would be in defiance of the stipulation and cannot be allowed. Therefore, they request that the Judge's decision be affirmed.

In response, BLM denies that it is attempting to disclaim the stipulation and states that it fully supports the stipulation as long as it is read in its totality,

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motion under advisement, indicating that we would rule on it when we addressed the merits of the appeal. Jacoby's comments on Judge Child's opinion are irrelevant to our consideration of BLM's appeal. For that reason, we hereby grant claimants' motion to strike Attachment B to BLM's brief. *See* 43 CFR 4.24(a).

as written, and in light of the fact that it was drafted by claimants. It contends that the only areas of dispute concern the definition of an island and whether BLM has stipulated away its case by agreeing that the original surveys were correctly done. BLM argues that the definition of island, which comes from old survey manuals, does not include a sentence requiring that the perpetual channel contain flowing water at all times. Furthermore, BLM asserts, claimants' suggestion that relevant case law should be ignored in interpreting this definition lacks legal support and defies common sense.

BLM admits that it agreed that the original surveys were correctly done, but contends that it did so in order to eliminate the question of gross error or fraud as possible legal issues in this case. It asserts that other provisions of the stipulation clearly indicate that the existence of the islands and the practice of 19th century surveyors concerning meandering islands were very much at issue in the case, citing part of the stipulation requiring BLM to prove that the lands were islands at the time of the original surveys (Stip. V. 1.) and that part which dentified as a legal issue to be determined whether there existed at the time of the original surveys an official or unofficial Government policy regarding the surveying of islands (Stip. VII. 1.). BLM argues that there would have been no need for these stipulations, if it had agreed as claimants allege.

BLM suggests that the stipulation appears to be both contradictory and ambiguous. Therefore, BLM asserts, the stipulation may not be relied on as conclusive, and the entire record must be reviewed to determine if it supports the stipulated facts.

BLM contends that it presented evidence explaining that the reason the surveyors followed some of their instructions (*i.e.*, to note all topographical features), but disregarded others (*i.e.*, to survey all islands) was because surveyors at that time did not survey islands which were not useful for agricultural purposes. It further emphasizes that the preponderance of the evidence definitively establishes the existence of the parcels as islands at the time of the original surveys, and argues that it would be improper for the Board to hold that the islands did not exist in 1889 and 1891 solely because of the stipulation.

IV. *Discussion*

The Secretary of the Interior is authorized and obligated "to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States." *R. A. Mikelson*, 26 IBLA 1, 8 (1976). In *Emma S. Peterson*, 39 L.D. 566, 567 (1911), this Department held that the United States has the authority to survey an island, located in navigable or nonnavigable waters, omitted from an original township survey if it appears that at the time of the original survey the island was a well-defined body of public land. From that time on, the Department has consistently maintained that an unsurveyed island, whether located in navigable or nonnavigable waters, remains public domain, does not pass with the bed under navigable waters to a state upon statehood or as an appurtenance to a patent of riparian land abutting nonnavigable waters, and may be surveyed and disposed of by the United States. *Mr. & Mrs. Thomas Dekker*, 114 IBLA 302, 305-06 (1990); *Northern Michigan Exploration Co.*, 114

IBLA 177, 186-88, 97 I.D. 171, 175-76 (1990); *Olive Wheeler*, 108 IBLA 296, 301 (1989), and authorities cited therein.

In *Scott* v. *Lattig*, 227 U.S. 229, 240-42 (1913), the Supreme Court applied the same rule to islands in navigable waters, holding that the omission of an island from survey does not divest the United States of title to the island nor interpose any obstacle to surveying it at a later date if the island existed at the time of the original survey as fast, dry land above the mean high water mark. The Court explained that such an island was not part of the bed of the river and, therefore, title to it did not pass with the bed of the river. *Id.* at 244. *See Texas* v. *Louisiana*, 410 U.S. 702, 713 (1973) (reaffirming the vitality of *Scott* v. *Lattig*); *see also R. A. Mikelson*, *supra* at 9. We have recently reaffirmed that this rule applies to isalnds in nonnavigable waters, despite the conflicting holding in *Bourgeois* v. *United States*, 545 F.2d 727 (Ct. Cl. 1977).[10] *See Mr. & Mrs. Thomas Dekker*,

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[10] The most critical reasoning flaw in *Bourgeois* v. *United States*, *supra*, was the attempt to establish a dichotomy between unsurveyed islands found in navigable bodies of water and those located in nonnavigable bodies of water by, in effect, ascribing a varying "intent" to retain or convey depending on whether or not the water body was navigable. Thus, if the island is located in a navigable body of water, the island is deemed to retain its public domain status (under the theory that nothing passes except by intent) whereas if it is located in a nonnavigable body it is deemed to pass as an appurtenance of the riparian patent (if state law so provides) unless a contrary intent is clearly expressed. Thus, the *Bourgeois* theory would postulate that when a surveyor fails to survey an island in a navigable stream he does so knowing that his failure to survey the island will not abrogate the title of the United States to the island, but when he fails to survey an island in a nonnavigable stream he does so because,

supra at 306-07; *Northern Michigan Exploration Co.*, *supra* at 186, 97 I.D. at 175-76; *Olive Wheeler*, *supra* at 301.

Claimants contend that none of the evidence presented at the hearing nor any of the case law cited by BLM has any bearing on this case because the stipulation mandates the conclusion that the parcels were not islands at the time of the original surveys. We must reject this contention.

A stipulation is a contract to which the general rules of contract interpretation apply. *United States*

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in his view, it is not an island worthy of survey and the United States should make no claim thereto.

This duality of approach might be understandable if, in fact, navigability determinations were a function of a cadastral surveyor; they are not. *See State of Montana*, 11 IBLA 3, 8, 80 I.D. 312, 314 (1973) ("The surveyors have no authority to make such [navigability] determinations"). Moreover, in many cases it would be literally impossible to make navigability determinations as of the date of survey, for the simple reason that the critical date for navigability determinations is the date of admission of the State into the Union and numerous surveys were completed prior to that date. In this case, the basis for the agreement that the Colorado River is nonnavigable throughout the reach in question is an opinion of the Colorado Attorney General, rendered on Mar. 30, 1950, that "there are no navigable waters of the United States in Colorado" (Exh. H of Exh. A of Exh. A-23). Even accepting this naked assertion of a conclusion which is totally unsupported by any factual analsyis (*but see United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926) "streams or lakes which are navigable in fact must be regarded as navigable in law"), it is clear that the Colorado Attorney General's determination of navigability postdated the original surveys in this case by well over 50 years. Any attempt to premise a differentiation in the treatment of islands in navigable and nonnavigable bodies of water based on the subjective intent of the surveyor is simply wrong.

v. *Ideal Cement Co.*, 5 IBLA 235, 241, 79 I.D. 117, 120 (1972), *aff'd*, *Ideal Basics Industries, Inc.* v. *Morton*, 542 F.2d 1364 (9th Cir. 1976). The stipulation should be considered as a whole with each provision given a reasonable meaning and none of it left useless. *ITT Arctic Services Inc.* v. *United States*, 524 F.2d 680, 684 (Ct. Cl. 1975). *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 202(a), 203(a) (1981). Claimants' reading of the stipulation renders superfluous the provision recognizing that whether the disputed parcels were islands at the time of the original surveys was a claimed fact "on which the Government shall put on its proof" (Stip. V.). Additionally, BLM's agreement that the original surveys were correct and in exact accordance with the instructions must be considered in conjunction with its position, identified in the stipulation as a legal issue to be determined, that it was the Government's policy at the time of the original surveys not to survey islands falling within the regular course of public land surveys (Stip. VII.). The stipulation, read as a whole, clearly indicates that BLM did not stipulate away its case. *See Ideal Basic Industries, Inc.* v. *Morton*, *supra* at 1369-70 (ambiguous stipulations, taken as a whole, were insufficient to amount to an admission).

Thus, we turn to consideration of the entire record compiled in this case to resolve the issues raised. The ultimate issue for consideration is whether, at the time of the original surveys, the disputed parcels were islands omitted from those surveys. Resolution of that issue requires that we focus on the condition of the parcels at the time of the original surveys, because if the parcels at issue here existed as islands at the time of the original 1889 and

1891 surveys, title to them remained in the United States, and BLM's 1982-87 surveys were properly accepted. *See Ritter* v. *Morton*, 514 F.2d 942, 947-48, 950 (9th Cir.), *cert. denied*, 423 U.S. 947 (1975); *see also Scott* v. *Lattig*, *supra* at 241-42. Evidence concerning subsequent changes in the parcels is relevant only to the extent it reflects on the condition of the parcels in 1889 and 1891. Thus, while it must be established that an identifiable land mass existed as an island as of the date of survey, there is no requirement that it must have been in continuous existence *as an island* since that time, nor is there any requirement that its size and shape remain constant over that period of time.

The Judge concluded that the parcels were not islands because the land masses were not fast, dry land at the time of the original surveys, nor were they permanent land masses separated from the mainland by perpetual channels. He reached this conclusion through an extremely narrow, literal interpretation of the stipulated definition of an island and a highly selective view of the evidence introduced at the hearing.

The parties agreed to a legal definition of "island" as "a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel" (Stip. VI. 5.).[11] The Judge considered this

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[11] Although the Judge found that he was constrained by this legal definition, stipulations as to legal matters are not binding on adjudicators. *See, e.g., Saviano* v. *Commissioner*, 765 F.2d 643, 645 (7th Cir. 1985). Indeed, this Board has expressly refused to countenance an erroneous stipulation of law, even where to do so would benefit the United States. *See*

definition to be more stringent than an "elementary school definition" of island, and he distinguished *Ritter* v. *Morton* on the basis that the court had applied the less rigid "elementary school definition" in that case. BLM asserts that the stipulated definition must be interpreted in light of relevant case law. We agree.

We find nothing in the circumstances surrounding the agreement of the parties to the stipulation which would support an overly restrictive meaning of the term "island." *See National Audubon Society, Inc.* v. *Watt*, 678 F.2d 299, 307 (D.C. Cir. 1982) (a stipulation must be interpreted in light of its evident purpose as gleaned from the circumstances under which the agreement was made). No reason has been posited why the parties would choose to use the term in other than its usual sense, and we believe that the stipulated definition, reasonably construed, does not preclude the application of common sense and relevant case law.

Judge Child found that the parcels were not fast, dry land at the time of the original surveys because they were unstable and ephemeral. According to the Judge, the evidence demonstrated that the parcels had gone through dramatic shifts, alterations, and changes since the original surveys, with single parcels dividing and multiple parcels uniting, and he concluded that none of the parcels had shown any capacity for constancy. In support of this conclusion, he cited Exhibits G-3, G-5, G-28, and G-29, which de-

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United States v. *Williamson*, 45 IBLA 264, 275-77, 87 I.D. 34, 40-41 (1980).

pict the shape and location of parcels at various times over the years.[12]

The key question, however, is whether these parcels were fast, dry land above the mean high water mark and separated from the mainland at the time of the original surveys. We find that the evidence in the present record overwhelmingly demonstrates that the six disputed parcels existed as islands at the time of the original surveys and that Judge Child ignored that evidence.

The disputed parcels clearly existed in some form in 1889 and 1891. The original surveyors mentioned them as topographical features in their field notes (Decision at 6), and the parcels appear on the plats prepared from those notes as surrounded by flowing water (*see* Tr. 262, testimony of Jacoby). BLM's virtually uncontested evidence establishes that each parcel has at least one tree on it which predates the original survey; each parcel was fast, dry land rising above the mean high water mark and separated from the mainland by a channel at that time; channels are in evidence today surrounding each parcel, although in some cases channels have been filled in by the adjacent riparian land owners; and the current size, shape, and location of each parcel are substantially similar to those shown on the original plats (*see* BLM Brief at 15-26 for the specific evidence pertaining to each parcel). Thus, BLM presented witnesses and exhibits establishing the existence of the parcels as islands in 1889 and 1891.

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[12] BLM introduced these exhibits to demonstrate, among other things, that the parcels have retained essentially the same size, shape, and location over the years, and the expert witnesses called by BLM testified that those exhibits did so demonstrate.

Claimants introduced no direct evidence rebutting that introduced by BLM concerning the condition of the parcels in 1889 and 1891. Instead, they focused on demonstrating that these parcels were partially, if not totally, inundated by the river in its flood stage. The mean or ordinary high water mark, however, as found by Judge Child, is not synonymous with the height of the water in the river during flood stage; rather, that term designates the level of the ordinary high flow of the river, and is readily observable as the line below which the soil is unfit for vegetation. *See, e.g., State* v. *Bonelli Cattle Co.*, 108 Ariz. 258, 495 P.2d 1312, 1314-15 (1972), *rev'd on other grounds*, 414 U.S. 313 (1973); *United States* v. *Claridge*, 416 F.2d 933, 934 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). The fact that these parcels are partially or completely submerged during flood stage does not preclude them from being islands. *See Raide* v. *Dollar*, 34 Idaho 682, 203 P. 469, 472 (1921).

We find that the great weight of the evidence in the record clearly demonstrates that the parcels were islands at the time of the original surveys and that they were omitted from those surveys.

Despite all this evidence, the Judge found that the parcels were not *permanent* land masses, as required by the stipulated definition, because they would eventually become attached to the mainland. He apparently based this finding on Osterkamp's testimony that the river was in a state of semi-disequilibrium, and that over time the land masses within the river would become attached to the floodplain and the river would become a single thread stream. Osterkamp also testified, however, that the time involved for that to hapepn would be "centuries, if not millenia" (Tr.

364). Judge Child evidently discounted that testimony, at least partially, because of his position, based on the stipulated definition of island, that any channel which separated a land mass from the mainland had to be "perpetual," *i.e.*, lasting for eternity (*see* discussion *infra*).

Given that over geologic time natural forces, such as erosion and accretion, change the shape and size of land masses, no land mass located in a river could satisfy Judge Child's interpretation of the terms "permanent" and "perpetual." Nothing in the stipulation, read in its entirety, indicates that the parties intended such a result. Clearly, BLM would never have agreed to such an interpretation, because it would have precluded BLM from establishing that the land masses were islands at the time of the original surveys, and the parties agreed in the stipulation that BLM was required to provide evidence of that fact at the hearing (Stip. V).[13]

The Judge also found that the channels separating the parcels from the mainland were not *perpetual* channels because they did not separate the parcels from the mainland when the parcels were inundated by water during the river's flood stages and when the channels were dry during low river flow. He concluded that in order for a channel to separate a land mass in a river from the mainland, it must

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[13] It appears more reasonable to assume that the parties used the term "permanent" to designate a stable land formation above the mean high water mark, as opposed to a transitory, shifting sand bar. *See, e.g., United States* v. *Otley*, 127 F.2d 988, 1001 (9th Cir. 1942); *State of Oregon*, 60 I.D. 314, 315 (1949). Consistent with our discussion *supra*, we find that the stipulated definition of "island" only requires that the land masses be permanent, not that the islands as islands be permanent.

contain water throughout its length, and that to meet the stipulated definition of island, such a channel must do so perpetually. We find these conclusions to be erroneous.

A channel is the depression of a stream bed below the permanent banks which forms a conduit through which waters flow and which may be full at some times and at others nearly, if not completely, dry. *State* v. *Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437, 443 (1907). It consists of a well-defined bed and banks. The bed carries the waters at their ordinary stage although

> [i]n extremely high water the bed may be much more submerged; [and] at other times it may not even be covered, but by close examination of the bed and banks of a natural water course one may readily distinguish the exact line of demarkation between them. * * * The banks of a water course are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are confined to a definite course and channel. Although at times these banks may be overflowed by flood waters, yet they themselves are unchanged, though not necessarily unchangeable. [Citations omitted.]

Maricopa County Municipal Water Conservation District No. 1 v. *Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369, 376-77 (1931).

Thus, a channel is an identifiable geomorphic structure which exists independently of the water which may flow through it. BLM established that each of the disputed parcels was separated from the mainland by a channel at the time of the original surveys,

and that these channels were still identifiable at the time of the hearing, although some had been filled in by the riparian land owners.

We find that this evidence satisfies the stipulated definition of an island, when the stipulation is read as a whole and in light of relevant case law. The evidence supports a finding that the parcels existed as islands at the time of the original surveys, and the fact that, over the course of geologic time, they will eventually become part of the mainland does not preclude such a finding. *See R. A. Mikelson*, *supra*, at 9; *see also United States* v. *Severson*, 447 F.2d 631 (7th Cir. 1971) *cert. denied*, 404 U.S. 1039 (1972).[14]

Judge Child also found that, under *Scott* v. *Lattig*, *supra*, the omission of an island from an original survey had to be the result of error in order for the United States to retain title to the omitted islands. He concluded that the surveyors did not omit the islands as a result of error, noting that the parcels were properly identified as topographic features and appeared on the plats of survey as such.

We have held that the parcels were islands, not mere topographic features, at the time of the original surveys. A consequence of that holding is that the failure of the original surveyors to survey the islands in question must either have been the result of an error[15] or simply the consequence of an unoffi-

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[14] In *R. A. Milkelson*, this Board stated, citing *Severson*, that when an island in an nonnavigable river is omitted from a survey, title to the island remains in the United States and "the island remains subject to survey *despite the disappearance of the channel separating the island from the lots which were formerly riparian.*" 26 IBLA at 9 (emphasis added).

[15] Although the parties stipulated that there was no error in the original surveys, if substantial evidence contrary to

cial Government policy not to survey islands unsuitable for cultivation. In either case, their failure to survey the islands did not divest the United States of title to those islands. *See Northern Michigan Exploration Co., supra* at 187-88 n.13, 97 I.D. at 176 n.13.[16]

Based on the entire record before us, we find that the parcels were islands omitted from the original surveys conducted in 1889 and 1891. Title to these islands remains in the United States, and they were properly surveyed by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

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a stipulation exists in the record, that stipulation may be disregarded. *See Smith* v. *Blackburn*, 785 F.2d 545, 549 (5th Cir. 1986); *Coastal States Marketing, Inc.* v. *Hunt*, 694 F.2d 1358, 1369 (5th Cir.), *reh'g denied*, 699 F.2d 1163 (5th Cir. 1983).

[16] We note that in C. Albert White, *A History of the Rectangular System of Survey* 81 (1980), following the citation of a Jan. 29, 1824, letter from the Commissioner of the General Land Office (GLO) to the Surveyor General setting forth a policy on the surveying of islands in which the Commissioner stated that "when a favorable opportunity occurs you may take measures to cause such of them to be surveyed as from the best information you can collect, may be worth the expense," White explained:

"This treatment of islands always remained. Unless an island was large, it was seldom surveyed during the regular, original rectangular surveys. Most islands were small and the cost of surveying, platting, and sale was greater than the monetary return to the government of $1.25 per acre. But the GLO always did and still does consider islands public lands until surveyed, platted, and sold."

See also Loyla C. Waskul, 102 IBLA 241, 246-47 (1988); *Joseph Tomalino*, 42 IBLA 117, 120 (1979).

the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Ramon M. Child is reversed.

/s/ Bruce R. Harris
BRUCE R. HARRIS
Administrative Judge

I concur:

/s/ James L. Burski
JAMES L. BURSKI
Administrative Judge

APPENDIX E

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 91-C-470

EDWARD H. KOCH, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

June 4, 1993

MEMORANDUM OPINION AND ORDER

CARRIGAN, District Judge.

Plaintiffs, Edward Koch, Walter Lemon, Roberta Lemon, Edward Juhan and Anthony Zarlengo, seek review of an Interior Board of Land Appeals decision dated February 21, 1991. That order affirmed dismissal of the plaintiffs' protests against the filing of surveys of six islands in the Colorado River. Defendants, United States, the Department of the Interior, the Interior Board of Land Appeals (IBLA) and the Bureau of Land Management (BLM), have moved for summary judgment. Plaintiffs have responded by opposing that motion and by cross-moving for summary judgment.

The parties have fully briefed the issues and oral argument would not be helpful. Jurisdiction exists under 28 U.S.C. § 1331.

I. *Factual and Procedural Background.*

The original surveys of the areas in question were performed in 1889 and 1891 by surveyors who did not meander any of the parcels at issue. However, the surveyors identified the parcels in their field notes. The parcels then appeared on the plats prepared from those notes. The United States patented the surveyed land adjacent to the Colorado River, incorporating by reference the relevant plats and field notes.

In 1982, the BLM commenced an investigation to determine ownership of twenty-two land masses in the Colorado River between Glenwood Springs and Grand Junction, Colorado. The BLM determined that nine of the twenty-two land masses were islands which existed and had not been meandered at the time of the original surveys. On the basis of that investigation, the BLM accepted surveys of those nine islands performed between 1982 and 1987 and announced in the Federal Register that it would officially file the survey plats in its Colorado office.

Prior to the proposed date for filing the survey plats, a number of individuals protested the filing. The protestors argued that they owned the islands under patents from the United States which described the patented lands by reference to the original survey plats for the townships in question. On July 28, 1988, the BLM's Colorado State Director dismissed the protests on the ground that the "United States claims ownership of the islands because they are islands not

previously surveyed which were in existence at the time of the original survey of the surrounding lands."

Certain of the protestors appealed the BLM decision to the IBLA, and requested a hearing.[1] The IBLA granted the request for a hearing and referred the case to an Administrative Law Judge (ALJ).

In a sixteen-page pre-hearing stipulation made a part of the hearing record, the parties stipulated that the stretch of the Colorado River containing the parcels at issue is non-navigable. The stipulation included excerpts from the surveying manuals and instructions directing the surveyors to meander islands and to note topographical features. The parties agreed that "[t]he surveys of the involved lands were accepted as having been completed in exact conformance with the [surveying] Instructions," and that "[t]he original surveys were neither fraudulent nor erroneous."

Under the terms of the stipulation, the plaintiffs were to prove that the subject lands were below the ordinary high water mark of the Colorado River at the time of the original surveys and thus were a part of the riverbed, while the BLM was to prove that those lands were islands at the time of the original surveys. The stipulation further defined an "island" as "a permanent land mass rising from the bed of a me-

---

[1] The instant action involves six of the nine islands for which surveys were accepted. The claimants of two of the islands failed to appeal from the BLM's dismissal of their protests. In addition, the BLM did not appeal the ruling of the Administrative Law Judge that another of the parcels was not an island at the time of the original survey. The six tracts here in question are identified as islands 9 (located in sec. 25, T. 6 S., R. 95 W.), 10 (located in sec. 35, T. 6 S., R. 95 W.), 14 (located in sec. 7, T. 7 S., R. 95 W.), 20, 21 and 22 (located in sec. 7, T. 8 S., R. 96 W.).

anderable body of water above the mean high water mark, separated from the mainland by a perpetual channel." Finally, the parties stipulated that "the original Government Land Office plats and field notes of the areas surveyed, having been incorporated by reference in the original patents, are a part of the description of the lands granted."

Following a hearing held on June 13-16, 1989, the ALJ concluded that the parcels at issue were not islands omitted from the original surveys of the area and, therefore, were not the property of the United States.

The BLM appealed that decision to the IBLA. On February 21, 1991, the IBLA reversed. The IBLA found that the parcels had been omitted from the original surveys conducted in 1889 and 1891 and that "[t]itle to these islands remains in the United States, and they were properly surveyed by BLM." The IBLA concluded that the United States had the authority to survey the islands because they were well defined bodies of public land that were omitted from the original township survey.

Thereafter, the plaintiffs filed the instant appeal.

II. *Analysis*

A. Decision Being Reviewed and the Scope and Standard of Review.

The parties disagree whether the decision to be reviewed is that of the ALJ or the IBLA. Plaintiffs contend that the IBLA was, in essence, sitting as an appellate court when it reviewed the ALJ's decision and therefore was bound by the ALJ's factual determinations unles they were clearly erroneous.

"Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law." *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir.1986). "On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule." *Id.* (quoting 5 U.S.C. § 557(b)). The IBLA retains the power to rule on disputed facts and the ALJ's determinations of such facts are not given the weight of the findings of fact by a district court. *Id.* As the reviewing court, I must review the decision of the board, not that of the ALJ. *Id.*

The scope of this court's review is "confined to the agency record or such portions of it which the parties may cite, and additional evidence is not to be admitted." *Roberts v. Morton*, 549 F.2d 158, 160 (10th Cir.1976). The IBLA's fact findings may only be set aside if this court cannot "conscientiously find that the evidence supporting the decision is substantial, when viewed in the light of the entire record. . . ." *Id.* Questions of law will be reviewed *de novo*. *United Transp. Union v. Dole*, 797 F.2d 823, 828 (10th Cir. 1986).

B. Whether the Parcels Were "Islands" at the Time of the Original Surveys.

The parties agree that if the parcels were not "islands" at the time of the original surveys, then they were a part of the river bed and therefore title to them passed along with the patents.

Plaintiffs contend that the parcels at issue were not islands omitted from the original survey. The heart of the plaintiffs' first argument is that the only way to prove that the parcels were islands at the time of

the original surveys would be to show error in those surveys because the surveyors were instructed to survey all islands and to note topographical features. Since the BLM stipulated that those surveys were not erroneous, the plaintiffs contend that any attempt to show error would defy the stipulation.

"Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them." *Fenix v. Finch*, 436 F.2d 831, 837 (8th Cir.1971). The stipulation that the original surveys were correct and in exact accordance with the instructions must be considered together with the other portions of the stipulation, including: (1) the BLM's position, identified in the stipulation as a legal issue to be determined, that the government's policy at the time of the original surveys was "not to survey islands falling within the regular course of public land surveys;" and (2) the stipulation that the BLM was to prove that the disputed parcels were islands at the time of the original surveys. When these three provisions of the stipulation are read together it is evident that the stipulation does not preclude a finding that the parcels were islands at the time of the original surveys.

Thus, it is necessary to determine whether the IBLA's conclusion that the land masses were "islands" (as that term is defined in the stipulations) at the time of the original surveys, is supported by substantial evidence in the record.

Plaintiffs contend that the evidence of the surveyors' decisions not to survey the parcels, the surveyors' descriptions of the parcels,[2] the fact that other islands

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[2] Parcels 9, 10 and 14 are described in Surveyor Churchfield's field notes as a "bar or low island," a "long low island, overflowing and unfit for cultivation," and a "low overflowing

were surveyed, and the testimony that the Colorado River is in a constant state of semi-disequilibrium all establish that the parcels were not islands at the time of the original surveys.

Plaintiffs, however, do not challenge the IBLA's findings that: (1) each parcel has at least one tree on it which predates the original surveys; (2) each parcel was fast, dry land rising above the mean high water mark and separated from the mainland by a channel at the time of the original surveys; (3) channels are in evidence today surrounding each parcel, although some channels have been filled in by the adjacent riparian land owners; and (4) the current size, shape, and location of each parcel is substantially similar to those shown on the original plats.

Although the plaintiffs' arguments are persuasive, the IBLA's decision that the land masses in question were "islands" at the time of the original survey is undoubtedly supported by substantial evidence in the record.

E. *Ownership of the Islands.*

The fact that the parcels in question were "islands" at the time of the original surveys, does not, however, end the inquiry into ownership. The Sixth Circuit recently held that the issue who has title to an unsurveyed island hinges on whether there is evidence, either expressed or implied, that the United States intended to retain the island. *Wolff v. United States*, 967 F.2d 222, 226 (6th Cir.), *rehearing denied*, 974

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island . . . bar or island," respectively. Surveyor House's field notes characterize parcels 20, 21, and 22 as a "large island" (the original plat depicts this parcel as three islands), an "island," and a "gravel bar," respectively.

F.2d 702 (1992). The court there concluded that where no contrary intent has been shown, "[w]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States. . . ." *Id.* (citations omitted); *see also Bourgeois v. United States*, 545 F.2d 727, 212 Ct.Cl. 32 (1976) (where the government's intent is not clear from the face of the patent, title to unsurveyed islands in non-navigable waters passes according to the laws of the state in which the islands are located.);[3] *cf. Ritter v. Morton*, 513 F.2d 942 (9th Cir.) *cert. denied*, 423 U.S. 947, 96 S.Ct. 362, 46 L. Ed.2d 281 (1975) (court must look at all the facts and circumstances in their totality to determine whether islands in a navigable river were intended to be included in the riparian grants); *United States v. Elliott*, 131 F.2d 720 (10th Cir.1942).[4] Therefore, if the government conveys riparian land along non-navigable waters and there is an absence of evidence

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[3] *Bourgeois* and *Wolff* are in conflict over whether state law governs ownership with regard to islands in navigable waters. Because the parties have stipulated that the instant search of the Colorado River where the islands are located is non-navigable, it is not necessary to decide whether the same rule applies to islands in navigable waters.

[4] In *Elliott* the court reasoned that the United States may intend to restrict a conveyance to lands ending at the riverbank when it disposes of riparian land on a non-navigable river. However, when such intent is not shown, and the lands are not within a state, what the grant conveys is a matter of common law principles and Supreme Court decisions. The court concluded that the grant at issue carried the exclusive right and title to the center of the stream including islands. The original surveys in the instant action were performed in 1889, thirteen years after Colorado statehood.

whether the government also intended to convey title to islands located within the river, title to the islands passes according to the laws of the state in which the property is located.

Defendants' arguments that the Sixth Circuit erred in *Wolff* are not persuasive. Defendants' contention that a long line of cases recognize that title to unsurveyed islands, whether located in navigable or non-navigable water, remains in the United States and may be surveyed and disposed of by the United States, is too broad a statement of the law. Indeed a close reading of the cases reveals that they are all based on the same principle recognized by the court in *Wolff*—that the intent of the United States governs the scope of its land grants. *See Wolff*, 967 F.2d at 225.

The parties have stipulated that the patents to the lands adjoining the disputed islands contained no express reservation of the islands to the United States. Thus, it is necessary to determine whether the facts and circumstances surrounding the original grants evidence an implied intent to retain the islands.

In *Wolff*, the court identified a number of relevant factors to consider in determining whether the government intended the island to be surveyed; (2) the size and value of the island at the time the littoral land was patented; and (3) whether the United States treated the island as public land in the past. *Wolff*, 967 F.2d at 225-26.

The parties have stipulated that the original surveys were neither fraudulent nor erroneous, and that they were accepted as having been completed in exact conformance with the surveying instructions. Indeed, the government produced evidence of an unwritten

policy that islands unsuitable for cultivation would not be surveyed.[5] This policy was justified by the fact that the cost of surveying, platting and sale was greater than the island's value. (IBLA decision at 54 n. 15.) Therefore, it is clear that the government did not intend to survey the islands at issue. Moreover, there is no evidence in the record that the United States has treated these islands as public lands.

In addition, as recognized by the court in *Bourgeois*, where, as here, the river involved was non-navigable, it would make little sense to pass title to all shorelands without reserving access easements to the islands. *Bourgeois*, 545 F.2d at 731 n. 3. Had the government intended to retain the islands, it probably would have reserved easements across the riparian land. There is no evidence that the government made any such reservations.

The most important evidence of an intent to convey the islands along with the riparian land is the inclusion of the islands in the surveyors' field notes and the plats which were incorporated by reference in the original patents and are a part of the description of the lands granted.[6] Parcels 9, 10 and 14 are described

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[5] The IBLA determined alternatively that the original surveyors erred when they failed to survey the islands. Here the stipulations provided that the original surveyors did not err in failing to survey the parcels. Plaintiffs were therefore justified in believing that this issue was settled and that no evidence showing absence of error was necessary. *See Bradford v. United States*, 651 F.2d 700, 704-05 (10th Cir.1981).

[6] The IBLA did not discuss what effect the description of the islands in the field notes has on the plaintiffs' claims of ownership. Indeed, there is a strong argument that the description of the islands in the field notes and the plats which were subsequently included by reference into the grants pre-

in Surveyor Churchfield's field notes as," respectively, a "bar or low island," a "long low island, overflowing and unfit for cultivation," and a "low overflowing island . . . bar or island." Surveyor House's field notes characterize parcels 20, 21, and 22 as, respectively, a "large island" (the original plat depicts this parcel as three islands), an "island," and a "gravel bar."

"In determining boundaries in any land patent case, special weight must be given to the precise description of the land contained in the surveyor's field notes and the official plat." *Ritter v. Morton*, 513 F.2d 942, 948 (9th Cir.1975). The fact that an island is mentioned in a surveyor's field notes and the official plat is highly persuasive evidence that the island was intended to be conveyed with the riparian land. *See id.; Firt Nat'l Bank v. United States*, 59 F.2d 367, 370 (8th Cir.1932). Patentees are entitled to rely on field notes and plats incorporated into their patents. *See Bradford*, 651 F.2d at 706.

Another fact bearing on the government's intent is the size and value of the respective islands at the time of the original surveys. The islands are substantially the same size and shape now as they were at the time of the original surveys. At present island 9 is 23.68 acres, island 10 is 66.63 acres, island 14 is 43.11 acres, island 20 is 19.51 acres, island 21 is 7.29 acres, and island 22 is 7.97 acres. Although these islands are larger than the island in *Wolff*, that fact alone is not dispositive. As discussed above, the instant islands were of little value at the time of the original surveys. Therefore, an intent to retain the

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vents the islands from being treated as lands "omitted" from survey.

islands can not be implied based solely on their size at the time of the original surveys.

Based on the facts that the government did not expressly reserve the islands, that the government did not intend to survey the islands, that the islands were then of little value, that the patents incorporated by reference the relevant plats and field notes which included the islands at issue, that the government apparently reserved no access to the islands across the nearest land, and that the government has not treated the islands as public land in the past, I conclude that there is no clear evidence that the government intended to reserve the islands when it conveyed the riparian land. As a result, ownership of the islands must be determined in accordance with Colorado law.

In Colorado, "when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act indicating an intention to make such reservation, the grant includes all that would pass by it, as if it were a private grant. *Stewart v. Lamm*, 132 Colo. 484, 289 P.2d 916, 917 (1955). Defendants do not dispute that Colorado has adopted the common law with respect to ownership of stream beds. *See More v. Johnson*, 193 Colo. 489, 568 P.2d 437, 439 (1977). *Accord*, *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979). Indeed, the parties have stipulated that "a grantee of land bordering on a non-navigable meandered river takes title to all submerged lands between the mainland and the thread of the river, unless expressly reserved by the United States." *See Bradford*, 651 F.2d at 706.

Furthermore, it is reasonable to conclude that Colorado would follow the common law rule governing

ownership of islands in non-navigable waters. Under that rule grants of land on a nonnavigable river entitle the grantee to all islands lying between the mainland and the thread of the stream. *Grand Rapids & I.R. Co. v. Butler*, 159 U.S. 87, 92, 15 S.Ct. 991, 992-93, 40 L.Ed. 85 (1895). It follows that the plaintiffs hold title to the islands here at issue.

Accordingly, IT IS ORDERED that:

(1) Plaintiffs' motion for summary judgment is granted;

(2) Defendants' motion for summary judgment is denied; and

(3) Judgment shall enter in favor of the plaintiffs and against the defendants.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 93-1298

D.C. No. 91-C-470

EDWARD H. KOCH, WALTER B. LEMON, ROBERTA A. LEMON, EDWARD N. JUHAN, ANTHONY F. ZARLENGO, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR, BOARD OF LAND APPEALS (THE), BUREAU OF LAND MANAGEMENT, DEFENDANTS-APPELLANTS

ORDER

Entered April 13, 1995

Before TACHA and BARRETT, Circuit Judges, and CAMPOS,* District Judge.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

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* Honorable Santiago E. Campos, Senior District Judge, United States District Court for the District of New Mexico, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER
Clerk

By /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX G

REVISED STATUTES (1873)

TITLE XXXII.—THE PUBLIC LANDS

* * * * *

CHAPTER SEVEN.

SALE AND DISPOSAL OF THE PUBLIC LANDS.

* * * * *

SEC. 2353. All the public lands, the sale of which is authorized by law, shall, when offered at public sale to the highest bidder, be offered in half quarter-sections.

SEC. 2354. All the public lands, when offered at private sale, may be purchased, at the option of the purchaser, in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections.

SEC. 2355. Every person making application at any of the land offices of the United States for the purchase at private sales of a tract of land shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half quarter-section, or quarter quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office.

SEC. 2356. Credit shall not be allowed for the purchase-money on the sale of any of the public lands, but every purchaser of land sold at public sale shall, on the day of purchase, make complete payment therefor; and the purchaser at private sale shall produce to

the register of the land office a receipt from the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase-money on any tract, before he enters the same at the land office; and if any person, being the highest bidder at public sale for a tract of land, fails to make payment therefor on the day on which the same was purchased, the tract shall be again offered at public sale on the next day of sale, and such person shall not be capable of becoming the purchaser of that or any other tract offered at such public sales.

SEC. 2357. The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land-office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: * * *.

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No. 95-253

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

EDWARD H. KOCH, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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SEPTEMBER 13, 1995

QUESTION PRESENTED

The Respondents submit that the question presented by the United States reflects its misreading of the law regarding patents of riparian lands. The Respondents believe that the question at issue is more properly stated as follows:

> Whether the intent of the United States when patenting riparian lands adjacent to a non-navigable river controls the transfer of insignificant land masses located between the meander line and the thread of the river.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-253

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EDWARD H. KOCH, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners.

STATEMENT OF THE CASE

The Respondents (collectively referred to herein as the "Landowners" or the "*Koch* Landowners") wish to correct certain inaccuracies and omissions in the United States' Statement, as follows:

This case concerns title to the bed of a non-navigable river. Five "islands" are the subject of this appeal. These "islands" were described in the deputy surveyors' field notes of the original 1889 and 1891 surveys as "gravel bars" or "islands" not required to be meandered under the then-controlling Surveyor's Instructions.[1] The plat prepared from

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[1] The parties entered into a stipulation on June 12, 1989, which was part of the record before the Administrative Law Judge and at the succeeding stages of this proceeding. For this Court's reference, the Landowners have submitted the stipulation in the Supplemental Appendix to this Response Brief, *infra*, pp. 1sa-25sa (cited hereinafter as "Supp. App."). In that stipulation, the parties set forth (among other provisions) the instructions governing the applicable surveys, and the surveyors' notes regarding the subject "islands." The surveys of these "islands" were conducted by Deputy Surveyor Churchfield in 1899 (pursuant to the 1855, 1864, and 1881 instructions), and by Deputy Surveyor House in 1891 (pursuant to the 1890 instructions, which did not change the 1864 instructions regarding the survey of small islands). Included in these surveyors' contracts was the charge to survey all islands, defined as "a body of land separated from the mainland by a perpetual natural channel." *See* 1864 Instructions quoted in Supp. App., *infra*, pp. 11sa-13sa, para. III.C.2.

As stated by the Administrative Law Judge:

> Fairly summarized it can be said that the instructions governing the original surveys required all islands between the surveyor established meander lines of the Colorado River to be meandered. Those

these surveys also contained sketches of the "islands," and the field notes and plat were incorporated into the patents the United States conveyed to these Landowners' predecessors in title.

The Administrative Law Judge (ALJ) conducted an on-site investigation of the "islands" at issue, considered first-hand the testimony and credibility of the United States' and the Landowners' witnesses, and relied upon the parties' stipulation[2] regarding certain controlling factual and legal issues. He found that the land masses were not islands at the time the original surveys were conducted; they "were included in the original survey and not omitted therefrom." U.S. App. at 36a-37a.[3]

Among the significant issues to which the parties stipulated are these:

1. The original surveys were required to be completed in strict conformity with the laws of the United States and the applicable survey instructions. No surveys

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> instructions also required the deputy surveyor to take field notes in which he was to exercise "the utmost care . . . to pass no object of topography . . . without giving a particular description."

U.S. App. at 25a. The parties do not dispute this finding of the ALJ.

2 *See supra* note 1.

3 Throughout this Response Brief, "U.S. App." shall refer to the Appendix to the United States' Petition for a Writ of Certiorari.

were approved by the United States Surveyor General until found to have been in exact accordance with the governing instructions.

2. The original Government Land Office plats and field notes of the areas surveyed, having been incorporated by reference in the original patents, are a part of the description of the lands granted.

3. An "Island" is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel.[4]

See Supp. App., *infra*, pp. 6sa-7sa, 22sa, para. III.B.1, VI.3, and VI.4, respectively.

Considering this stipulation between the parties, the Landowners are surprised that the United States now argues that "surveyors did not always understand or fastidiously follow the [surveying instructions] given them," U.S. Pet. at

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[4] Deputy Surveyors Churchfield and House did not meander the "islands" which are the subject of this appeal. The Landowners have consistently maintained that these surveyors did not survey the subject "islands," because at the time the surveys were conducted, these land masses did not meet the surveying instructions' definition of an island. *See* governing survey instructions cited *supra* note 1. In support of this argument, the Landowners emphasize that Churchfield meandered at least two islands in the relevant stretch of the Colorado River. *See* Supp. App., *infra*, pp. 18sa-19sa, para. III.D.2.

6,[5] and that the "islands" were "mentioned . . . in the surveyors' field notes and sketched onto the accompanying plat, which created a reference for future survey and disposition," *id.* at 7. (The United States cites no authority for this "future reference" statement.) As the United States has stipulated, and as supported by this Court's decisions, the *Koch* "islands" were described on the plat and incorporated into the description of the property conveyed by patents to the Landowners' predecessors. *See* Supp. App., *infra*, p. 22sa, para. VI.3. *See also, Cragin* v. *Powell*, 128 U.S. 691, 696 (1888) ("It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.").

Nearly 100 years have passed since Deputy Surveyors Churchfield and House conducted their surveys of the subject Colorado River lands, and since the United States patented the riparian lands to the *Koch* Landowners' predecessors without any reservations, express or implied.[6] Not until 1982 did the United States show any interest in the subject "islands." Prior to that time, it had continuously stated to

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[5] Throughout this Response Brief, "U.S. Pet." shall refer to the United States' Petition for a Writ of Certiorari.

[6] Notably, the United States did not reserve any rights of way to the "islands" in the subject patents.

interested parties that no public lands existed in the relevant stretch of the Colorado River.[7]

ARGUMENT: REASONS TO DENY THE PETITION

Summary of argument

This Court should exercise its discretion to deny the United States' Petition for a Writ of Certiorari. No "special and important reasons" exist for this Court to hear this case. *See* SUP. CT. R. 10. The subject decision of the United States Court of Appeals, Tenth Circuit, is not in conflict

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[7] The landowners filed with the Tenth Circuit a Supplemental Appendix to the Brief for Edward H. Koch, et al., Appellees, which included (in addition to the above-referenced stipulation) the following documents: Letter from Helen Odegaard, Acting Assistant Manager, Branch of Lands Adjudication, Bureau of Land Management (BLM), United States Department of the Interior, to Robert C. Cutter (May 19, 1966); Letter from R. Keith Miller, District Manager, BLM, United States Department of the Interior, to Stanford Dere (Jan. 26, 197_); Memorandum from Vern E. Lane, Acting Chief, Branch of Cadastral Surveys (Sept. 19, 1969) (stating "I have attempted to clarify the public land ownership of riparian lands of that segment of the Colorado River from New Castle downstream to the Colorado-Utah boundary, and to my knowledge no public land areas have been overlooked."); and Decisions of the BLM (one such decision was included in the said Supplemental Appendix; three others were part of the record), Department of the Interior (Oct. 23, 1961), which memorialized the United States' rejection of offers to lease the Colorado River bed (wherein were located the "islands" here at issue). The Landowners submit that these documents evidence that the United States was not interested in the subject "islands" until approximately 1982, when the BLM conducted an investigation and determined that it would claim the "islands" as unsurveyed public lands.

with the decisions of other courts of appeals or the United States Supreme Court on the same matter. *See id.*

A number of United States Supreme Court and lower federal court decisions have considered the issue of title to islands in watercourses. These cases may be grouped into two categories: those involving navigable watercourses,[8] and those involving non-navigable watercourses. The subject case involves "islands" in a non-navigable stretch of the Colorado River. No split of federal decisions exists with respect to title to islands in non-navigable watercourses. The controlling decisions in the non-navigable context include *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Mitchell* v. *Smale*, 140 U.S. 406 (1891); *Whitaker* v. *McBride*, 197 U.S. 510 (1904); *Bourgeois* v. *United States*, 545 F.2d 727 (Ct. Cl. 1976); *Wolff* v. *United States*, 770 F. Supp. 1205 (W.D. Mich. 1991), *aff'd*, 967 F.2d 222, *reh'g denied*, 974 F.2d 702 (6th Cir. 1992). In all of these cases, the courts found that title to the disputed lands was vested in the adjacent riparian landowners.

Moreover, when one considers the navigable watercourse cases and non-navigable watercourse cases together, one finds that the cases do not exhibit a split in reasoning or pose a threat to the United States' authority to survey and dispose of public lands. The cases collectively illustrate that the United States' intent determines the issue

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[8] All of the primary cases upon which the United States relies are navigable-waters cases. These include, for example, *Texas* v. *Louisiana*, 410 U.S. 702 (1973); *Moss* v. *Ramey*, 239 U.S. 538 (1916); *Scott* v. *Lattig*, 227 U.S. 229 (1913); and *Mission Rock Co.* v. *United States*, 109 F. 763 (9th Cir. 1901), *aff'd*, 189 U.S. 391 (1903).

of title if that intent is clear; and that, where the United States' intent is ambiguous, the court decides the issue under the state's common law. *See e.g., Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U.S. 87 (1895).

The United States District Court, District of Colorado, and the United States Court of Appeals, Tenth Circuit, both found in *Koch* that the United States did not evidence a clear intent to retain the subject "islands," and therefore under Colorado law, the title vested in the patentees of the abutting riparian lands. U.S. App. at 8a-12a, 76a-80a.

Argument

The sole alleged basis for the United States' Petition is that "[t]his case presents an important question of public land law that has generated a serious and irreconcilable conflict among the courts of appeals." U.S. Pet. at 11. At best, this statement reflects a stretch of reason; at worst, it is a misstatement of the law. No conflict between the courts of appeals exists.[9]

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[9] In an effort to heighten the importance of this case, the United States "estimates" that "11,000 unsurveyed islands" remain within the public domain. U.S. Pet. at 13. This claimed retention of ownership lacks merit, however, unless the United States can establish an intent to reserve the islands when the riparian lands were patented. *See Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U.S. 87 (1895) (*see* discussion in text pp. 13-15, *infra*). *See also*, *Bourgeois*, 545 F.2d at 730-31; *Wolff*, 967 F.2d at 225. In the *Koch* case, the United States did not show any interest in (much less any intention to reserve) the subject "islands" until nearly 100 years after the original surveys. Prior to that time, it had consistently maintained that no public lands existed

All of the courts of appeals' decisions on this matter are consistent with this Court's repeated pronouncements that the threshold issue to be determined is whether the United States has evidenced an intent to retain title to the islands. *See e.g.*, *Hardin* v. *Jordan*, 140 U.S. 371, 384 (1890); *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U.S. 87, 94 (1895). Where the United States' intent, express or implied, is not evident, the Court looks to state law to construe the grant. As this Court stated in *Hardin*, 140 U.S. at 384, "[i]n our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the lands lie."[10] Under the prevailing common law, "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof." *Grand Rapids*, 159 U.S. at 94.

The Landowners submit that a review of this Court's decisions on this matter is instructive to illustrate that the

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in the relevant stretch of the Colorado River. *See* discussion in note 7, *supra*.

The Landowners do not dispute that the Secretary of the Interior has the authority to "ascertain the boundaries of public lands." *See* U.S. Pet. at 12 (citing Federal Land Policy and Management Act of 1976 (FLPMA) § 201, 43 U.S.C. 1711 (1990)). However, even under FLPMA, the United States cannot survey and dispose of lands which it does not own.

[10] The lands in dispute in *Hardin* were a "streak or tongue of upland not covered by water at its ordinary height." *Id.* at 374. The subject lake was non-navigable in fact. *Id.* at 377.

Tenth Circuit's decision in *Koch* does not conflict with Supreme Court precedent or the decisions of the other courts of appeals.

Under the equal footing doctrine, the bed of a navigable river or lake passed to the state upon statehood. *See e.g., Hardin*, 140 U.S. at 381. This Court has held that an unsurveyed island in a navigable watercourse does not pass to the state but remains public land (subject to future disposition by the United States) if the following criteria are met: (1) the island existed as a stable formation at the time of statehood and was of significant size,[11] and (2) the United States intended to retain title to the island. Such intent can be imputed, for example, by a failure to survey the island due to obvious error on the part of the surveyor, *see Moss* v. *Ramey*, 239 U.S. 538 (1916); and *Scott* v. *Lattig*, 227 U.S. 229 (1913); or by the island's apparent value for military purposes, *see Mission Rock Co.* v. *United States*, 109 F. 763 (9th Cir. 1901), *aff'd*, 189 U.S. 391 (1903).[12]

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[11] In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908), this Court found that title to certain islands in a navigable watercourse had passed from the United States to the riparian landowner. It stated that "[t]he islands are little more than rocks, rising very slightly above the level of the water[,]" *id.* at 451, and that "[i]f they had belonged to the United States, probably they would have passed as unsurveyed islands and neglected fragments pass[,]" *id.* at 452. Because the islands were of "no apparent value," *id.* at 451, the Court would not find that the United States intended to reserve them from the patent to the riparian landowner.

[12] *Mission Rock* presented a question somewhat distinguishable from the issue of the United States' intent considered in *Moss* and *Scott*. The patent to Mission Rock's predecessor in title was from the State of California, which could not convey islands that had not

In contrast, ownership of the beds of non-navigable watercourses did not pass from the United States to the states under the equal footing doctrine. Common law governs title to the bed and islands within non-navigable watercourses, and under common law the riparian landowner is entitled to all islands lying between the edge of the riparian land and the center of the watercourse. In *Hardin*, this Court cited with approval the "well said" holding of the Illinois Supreme Court in *Middleton* v. *Pritchard*, 4 Ill. 510:

> [A]ll grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main land and the centre thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right.

140 U.S. at 384 (emphasis added). Thus, even in non-navigable watercourse cases, the intent of the United States is deemed elemental to the title analysis.

In *Mitchell* v. *Smale*, 140 U.S. 406 (1891), a companion case to *Hardin*, this Court explained the policy supporting the rule that the exposed lands within the watercourse belong to the adjacent riparian landowner (pursuant to common law), under circumstances where the United States' intent to reserve the islands is unclear:

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passed to the state under the equal footing doctrine. *Mission Rock*, 189 U.S. at 404.

> [W]e think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned.

140 U.S. at 412-13.[13]

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[13] This statement regarding "vexatious litigation" has caused the *Koch* Landowners to request attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1990). Ignoring this Court's holdings in (for example) *Hardin*, *Mitchell*, and *Grand Rapids*, the United States has developed its own exceedingly broad rule of law "that the United States retained ownership of unsurveyed public islands." U.S. Pet. at 11. *See also, id.* at 27. As purported authority for this statement, the United States relies upon the decision in *Emma S. Peterson*, 39 Pub. Lands Dec. 566 (1911), and the BLM, *Manual of Surveying Instructions* (1973).

The Landowners submit that the United States' reliance upon *Emma* and its own surveying instructions for developing a rule of law was substantially unjustified. *Emma* involved the resurvey of an island in the Snake River, a navigable river. The First Assistant Secretary's

In accord with the *Hardin* and *Mitchell* decisions is *Grand Rapids & Indiana R. R. Co.* v. *Butler*, *supra*, wherein this Court affirmed the Michigan Supreme Court's decision awarding the riparian landowner title to a previously unsurveyed island in a navigable river. The result would have been the same even if the river had been non-navigable, for under the common law, "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof." *Grand Rapids,* 159 U.S. at 94. After considering a "large mass of testimony . . . as to the character of this so-called island at the time of the original surveys and for some years subsequent," the Michigan Supreme Court stated that "it is of no consequence whether it was what might be termed an 'island' or a 'sand bar' or a 'piece of low wet ground.' The law is the same in either case." *Id.* at 89.

This Court "entirely concurred" in the Michigan court's finding that when the United States had not evidenced

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statement that the United States can resurvey any island in a non-navigable stream is therefore dicta. *See* 39 Pub. Lands Dec. at 567. Moreover, the First Assistant Secretary and the Bureau of Land Management do not have the authority to overrule the law of the United States as determined by this Court. That law was clearly delineated in *Grand Rapids*, which held that when the United States had not evidenced an intent to reserve an island, title to the island passed to the riparian landowner under the common law. 159 U.S. at 92.

Even *Moss* v. *Ramey*, *supra*, and *Scott* v. *Lattig*, *supra*, the two principal decisions upon which the United States relies, are consistent with this Court's prior holdings that the threshold issue to be determined is the United States' intent when making the grant. *Emma S. Peterson* could not have changed this result (even if it purports so to do).

any intention to reserve the island, the island was patented to the riparian landowner under the common law:

> In the present case there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus completing the survey in that region.[14]

Id. at 91-92. Based on the evidence that nothing indicated "mistake or fraud, and the government ha[d] never taken any steps predicated on such a theory," *id.* at 95, this Court

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[14] The *Grand Rapids* decision is strikingly similar to the case at bar. In *Koch*, the deputy surveyors had also declined to survey the subject "islands," designating the land masses as, *inter alia*, "bar or low island"; "long low island, overflowing and unfit for cultivation"; and "gravel bar." Supp. App., *infra*, pp. 18sa-20sa, para. III.D.2., III.D.3. In *Grand Rapids*, the United States had failed to show any interest in the subject islands for 20 to 25 years. In *Koch*, the United States failed to show any interest in the "islands" for nearly 100 years! During the century after the original surveys at issue in *Koch*, the United States did not raise any concerns regarding mistake or fraud in these surveys. In fact, the United States has stipulated that the *Koch* original surveys were not erroneous. Supp. App., *infra*, pp. 9sa, 21sa, para. III.B.5., III.B.6, III.D.7.

found that the island passed to the adjacent riparian landowners.[15]

The United States cites four courts of appeals' decisions which it alleges illustrate a "split" of authority: *United States* v. *Severson*, 447 F.2d 631 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); *Ritter* v. *Morton*, 513 F.2d 942 (9th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975); *Bourgeois* v. *United States*, 545 F.2d 727 (Ct. Cl. 1976); and *Wolff* v. *United States*, 770 F. Supp. 1205 (W.D. Mich. 1991), *aff'd*, 967 F.2d 222, *reh'g denied*, 974 F.2d 702 (6th Cir. 1992).[16] The United States argues that the *Bourgeois* and *Wolff* decisions "have ruled that *Scott* is not controlling and have reached a contrary result [as compared to *Severson* and *Ritter*]." U.S. Pet. at 16.

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[15] On the basis of this Court's decisions in *Hardin*, *Mitchell*, and *Grand Rapids*, the Landowners submit that the United States overreaches in its interpretation of *Whitaker* v. *McBride*, 197 U.S. 510 (1904). The United States relies upon *Whitaker* to support its claim that it has somehow implicitly reserved a universal authority to survey any previously unsurveyed islands and dispose of them thereafter, without any consideration of its intent when patenting the adjacent riparian uplands. *See* U.S. Pet. at 20, n. 10. *Whitaker* did not analyze the circumstances under which the United States could survey a previously unsurveyed island for purposes of sale to a settler. The United States was not a party, and therefore its rights were not at issue. The Landowners submit, however, that if the United States' rights had been at issue in *Whitaker*, this Court would have followed its prior decisions and considered first whether "there [was any] act on the part of the government showing any intention to reserve this land." *See Grand Rapids*, 159 U.S. at 92. *See also, Hardin*, 140 U.S. at 384.

[16] *See* U.S. Pet. at 17-21.

The Landowners maintain that this purported "split" is nonexistent. These four courts of appeals' decisions rely upon and are consistent with the Supreme Court precedent analyzing title to islands by considering foremost the United States' intent when patenting the littoral lands, and, if that intent is not apparent, by looking to state law to construe the grant. *See e.g.*, *Hardin*, 140 U.S. at 384; *Grand Rapids*, 159 U.S. at 94. *Bourgeois* and *Wolff* reach a different result from *Severson* and *Ritter* and uphold the riparian landowners' claims to title of the islands, but only because the United States' intent was ambiguous when the riparian lands were surveyed and patented. Had the United States made its intent to retain title to the islands clear, the *Bourgeois* and *Wolff* courts would have held for the United States. Under the circumstances, however, they were directed by Supreme Court precedent to look to state law, which provided that the title was vested in the littoral landowners.

In the first of the four cited courts of appeals' decisions, *United States* v. *Severson*, the court considered title to Mississippi River islands which were large (20 acres and 254.81 acres) in comparison to the patented littoral lots (38.4 acres and 33.6 acres). The evidence disclosed that the islands existed at the time of Wisconsin statehood. "Applying the explanations of *Scott* v. *Lattig*," the Seventh Circuit found that the United States had retained title when it patented the littoral land. 447 F.2d at 635.

Scott had explained that when an island was large enough (138.15 acres) vis-à-vis the patented littoral lots, omission of the island from the original survey was

attributable to error. 227 U.S. at 241-42. This error created an inference that the United States did not intend to convey the island when it patented the adjacent riparian land:

> Of course, the error in omitting it from the survey did not devest the United States of the title, or interpose any obstacle to surveying it at a later time. Neither was the error calculated to induce purchasers of the fractional subdivisions on the east bank to believe that by paying for the 73.30 and 98.75 acres in those tracts they would get, respectively, 54.75 and 83.40 acres more on the island on the other side of the 300-foot channel.

Ibid.[17]

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[17] The United States argues in effect that the *Koch* Landowners could only have received the riparian uplands, because only those acres formed the basis for the purchase price of the lands patented. *See e.g.*, U.S. Pet. at 7-8, 25-26. This argument is specious. Under the United States' theory, no riparian owner on a non-navigable watercourse would own any lands beyond the United States' surveyed meander line. This is not the law. In *Hardin*, *supra*, this Court reiterated the well-settled principle that a meander line is not a boundary; the body of water whose margin is meandered is the true boundary. 140 U.S. at 381. *See also, Mitchell*, 140 U.S. at 415 (holding that the patent conveyed to the riparian landowner the land to the "actual water line of the [non-navigable] lake, wherever that may be, with the riparian rights incident to such position"). The description of the number of acres patented to the *Koch* Landowners' predecessors did

In the second cited appellate decision, *Ritter* v. *Morton*, the Ninth Circuit similarly relied upon *Scott* v. *Lattig* and considered factors indicative of whether the government intended to retain title to certain islands in the Snake River (a navigable river). These factors included the islands' size, location, remoteness and value at the time of the original survey. 513 F.2d at 948-50. As in *Scott*, the islands in *Ritter* were apparently omitted from the original survey due to the surveyor's error. *Id.* at 944, 948. The United States therefore had not intended to convey the islands to the riparian patentees.

The third cited appellate decision, *Bourgeois* v. *United States*, emphasized the distinctions between navigable watercourse cases, and non-navigable watercourse cases.[18] Noting a complete lack of on-point precedent of a non-navigable water "island case" where the intent of the United States in patenting the shoreland was not expressed, the court held the best analogy was to the non-navigable "water bed

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not limit the scope of their grants—particularly when the United States failed to reserve the bed of the river or any land masses therein.

The Landowners also note that in the course of presenting its evidence, the United States made no attempt to compare the acreage of the subject "islands" to the patented riparian uplands. The facts of *United State* v. *Severson* are therefore clearly distinguishable from the instant case.

[18] *Bourgeois* is a non-navigable waters case. In contrast, the other cases upon which the United States relies to allege a split in authority (i.e., *Scott* v. *Lattig*, *United States* v. *Severson*, and *Ritter* v. *Morton*) are navigable waters cases. This fact alone supports this Court's denial of the United States' Petition. *See e.g.*, text *supra* pp. 7, 11.

cases." 545 F.2d at 731. The court considered the island's size (6.76 acres), its relative remoteness, its rather limited value in 1866 (the time of the original survey), and the fact that the United States did not reserve an approach to the lake to access the island when it patented the lands around the lake. *Ibid.* These considerations failed to disclose the United States' intent regarding any reservation of title. The court then held that because the United States' intent was ambiguous, ownership of the island was to be determined under state law. *Ibid.* The Landowners submit that if the *Bourgeois* court had found that the United States intended to retain title to the island (as was found in *Scott* v. *Lattig*), the court would most likely have held for the United States.

The fourth appellate case the United States cites to allege a split in authority is *Wolff* v. *United States*. In *Wolff*, the surveyors who conducted the original surveys were directed to survey all islands "suitable for cultivation." 967 F.2d at 223-24. The subject island was left unsurveyed in the 1839 and 1853 surveys and was not surveyed until 1985. The *Wolff* court considered the matter of the United States' intent, noted that no surveyor's error was apparent, and found that the littoral land was "ten times as great" in size as the island ("[t]he tail was not disproportionate in size to the dog of which it was an appendage"). *Id.* at 225. The island was of no apparent value at the time of the original survey, and "the United States did not treat the island as public land for over a century." *Id.* at 226. Also noteworthy was the fact that the United States did not reserve an approach to the lake. *Ibid.*

Based upon these facts, the *Wolff* court found that the United States did not evidence an intent to reserve title to the island, and that therefore the court was directed to determine title under state law. *Ibid.* (citing, among other cases, *Hardin*, *supra*; *Grand Rapids, supra*; and *State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)). Under Michigan law, which adopted the common law, title to the island was vested in the riparian landowner.

The United States made the same argument in *Wolff* that it made in *Koch* before the Tenth Circuit and is currently making before this Court, namely that under *Moss* v. *Ramey*, and *Scott* v. *Lattig*, the courts have no choice but to find that title to unsurveyed islands remains in the United States until they are "explicitly relinquished." *Wolff*, 967 F.2d at 225. This is not the law. The *Wolff* court explained how its decision was consistent with *Moss* and *Scott* and the other Supreme Court precedent:

> We do not read *Moss* and *Scott* as establishing so sweeping a principle. In our view these cases—which do not purport to overrule the earlier caselaw— simply represent applications of the familiar concept that the intent of the United States, express or implied, governs the scope of its land grants.

967 F.2d at 225 (citing *Oklahoma* v. *Texas*, 258 U.S. 574, 594-95 (1922)).

Thus, by relying in part upon the decisions in *Bourgeois* and *Wolff*, the Tenth Circuit in *Koch* did not

depart from precedent established by this Court or from prior decisions of the other courts of appeals. The Tenth Circuit properly decided *Koch* in the context of this Court's rulings that when the United States' intent regarding the grant of riparian uplands is ambiguous, the court must construe the grant under state law. *See* U.S. App. 6a-12a. Both the District Court and the Tenth Circuit found that with respect to the *Koch* "islands," the United States did not evidence a clear intent to reserve title. Facts, including stipulated facts, supporting this determination are many:

1. The relevant patents did not reserve the "islands" to the United States. Supp. App., *infra,* p. 6sa, para. III.A.(7).

2. Pursuant to detailed survey instructions, Deputy Surveyors Churchfield and House were directed to survey all islands separated by a perpetual channel, and to note all topographical features. Supp. App., *infra,* pp. 11sa-18sa, para. III.C.2 to III.C.5. *See also*, U.S. App. 70a.

3. Churchfield and House did not meander the subject "islands," but they did variously note them in their field notes as "gravel bar," "gravel bar overflowing," "small island," or (in one case) "large island." Supp. App., *infra,* pp. 18sa-20sa, para. III.D.2, III.D.3. The Churchfield and House surveys were accepted as having been conducted in exact accordance with the applicable survey instructions. *Id.* at p. 9sa, para. III.B.5, III.B.6. *See also,* U.S. App. 70a.

The original surveys were neither fraudulent nor erroneous. Supp. App., *infra*, p. 21sa, para. III.D.7.[19]

4. The field notes were used to prepare the relevant plats, and the original Government Land Office plats and field notes of the areas surveyed were incorporated into the original patents and made a part of the description of the lands conveyed to the *Koch* Landowners' predecessors. *Id.* at p. 22sa, para. VI.3.

5. The United States did not reserve any easements across the granted uplands to access the islands. U.S. App. at 77a.

6. There is "no evidence in the record that the United States has treated these islands as public lands." *Ibid.* In recent decades, the United States had repeatedly maintained that the "islands" were not public lands. *See supra* note 7.

7. The United States has admitted that the "islands" were "once considered worthless." U.S. Pet. at 13.[20]

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[19] The Landowners believe that the fact that the United States has stipulated that no errors were made in the original surveys further supports the Landowners' request for attorney's fees under the Equal Access to Justice Act. *See also, supra* note 13. This lack of "fraud or mistake" on the part of the surveyors is very telling of the fact that the United States had no intention to retain title to the "islands." *See Moss* v. *Ramey*, *supra*, and *Scott* v. *Lattig*, *supra*.

[20] If the "islands" had no apparent value at the time of the survey, the United States surely did not intend to retain ownership of

Because the United States' intent was ambiguous, the District Court and the Tenth Circuit looked to Colorado law to determine title to the subject islands, pursuant to this Court's preceding opinions, and consistently with the decisions in the other federal courts.

Although no Colorado decisions are directly on point with *Koch*, the District Court and the Tenth Circuit reasonably concluded that certain Colorado decisions reflect Colorado's adoption of the common law[21] and are indicative of how Colorado law would determine rights to the islands. *See* U.S. App. at 11a (citing *More* v. *Johnson*, 193 Colo. 489, 568 P.2d 437 (1977) ("The general rule of law followed in Colorado is that a deed conveying land bordered by a non-navigable stream includes the bed to the center."); *see also, United States* v. *Goodrich Farms Partnership*, 947

---

them.

[21] Colorado statute makes this adoption of the common law clear:

> The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

COLO. REV. STAT. ANN. § 2-4-211 (West 1989).

F.2d 906, 908 (10th Cir. 1991); *People* v. *Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979)).

The District Court and the Tenth Circuit found "that Colorado would follow the common law rule for islands in the river, which holds that 'all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current.'" U.S. App. at 11a (quoting *Hardin*, 140 U.S. at 384). *See also*, U.S. App. at 79a-80a.

Therefore, the Tenth Circuit's decision that Colorado law would vest title in the Landowners is proper and does not conflict with prior decisions of this Court or of other courts of appeals.

CONCLUSION

The decision of the United States Court of Appeals, Tenth Circuit, in *Koch* v. *United States* is not in conflict with the decisions of any other United States court of appeals or of this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 13, 1995

SUPPLEMENTAL APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

EDWARD H. KOCH, et al.,	IBLA Docket No. 89-1
Appellants	Hearing on Protest
v.	Survey of Islands in Colorado River
BUREAU OF LAND MANAGEMENT	
Respondent	

STIPULATION

I. EXHIBITS WHICH MAY BE OFFERED

The parties may offer any exhibit which is believed to be relevant or material to the issues of this case, subject to the objections of materiality, relevancy or reliability.

II. EXHIBITS WHICH SHALL BE ADMITTED

A. Copies of original field notes relating to the surveys of the following Townships and related plats:

1. T. 5 S., R. 90 and 91 W. of the 6th P.M.; (Willamson)
2. T. 6 S., R. 91 W. of the 6th P.M.; (Clark)
3. T. 6 S., R. 92 W. of the 6th P.M.; (Clark)
4. T. 6 S., R. 93 W. of the 6th P.M.; (Clark)
5. T. 6 S., R. 94 W. of the 6th P.M.; (Churchfield)
6. T. 6 S., R. 95 W. of the 6th P.M.; (Churchfield)
7. T. 7 S., R. 95 W. of the 6th P.M.; (Churchfield)
8. T. 7 S., R. 96 W. of the 6th P.M.; (Churchfield)
9. T. 8 S., R. 96 W. of the 6th P.M.; (House)
10. T. 8 S., R. 97 W. of the 6th P.M.; (Simons)

B. Copies of original Government Patents to lands adjoining the Colorado River in the involved reach, described as follows:

1. Section 25, T. 6 S., R. 95 W. of the 6th P.M.

   Patent Nos.:
   1. 12
   2. 995
   3. 1029

2. Section 35, T. 6 S., R. 95 W. of the 6th P.M.

Patent Nos.:
1. 1041
2. 1195
3. 12
4. 1194

3. Section 7, T. 7 S., R. 95 W. of the 6th P.M.

Patent Nos.:
1. 915
2. 902
3. 715
4. 842979
5. 699

4. Section 7, T. 7 S., R. 95 W. of the 6th P.M.

Patent Nos.:
1. 699
2. 915
3. 715
4. 842979
5. 902

5. Sections 6 and 7, T. 8 S., R. 96 W. of the 6th P.M.

Patent Nos.:
1. 968730
2. 1351

3. 14
4. 6
5. 1127

6. Section 7, T. 8 S., R. 96 W. of the 6th P.M.

Patent Nos.:
1. 968730
2. 1351
3. 14
4. 1127

III. FACTS STIPULATED

The Parties stipulate and agree to the following facts which are deemed admitted and which will require no proof at trial:

A. OWNERSHIP OF LANDS ADJACENT TO DISPUTED AREAS

(1) Walter B. Lemon and Roberta A. Lemon hold title to lands along the south bank of the Colorado River in Section 25, T. 6 S., R. 95 W. of the 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 37 in that section.

(2) Flora Dere holds title to lands along the north bank of the Colorado River in Section 35, T. 6 S., R. 95 W. of the 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 39 in that section.

(3) Edward H. Koch holds title to lands along the north bank of the Colorado River in Section 7, T. 7 S., R. 95 W. of the 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 37 in that section.

(4) Richard E. Looney and Daisey B. Looney hold title to, and Jan Ertl, by virtue of a contract of purchase and sale, asserts an interest in, lands along the north bank of the Colorado River in Section 7, T. 7 S., R. 95 W. of the 6th P.M., through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tract 37 in that section.

(5) Edward N. Juhan and Anthony Zarlengo hold title to lands along the south bank of the Colorado River in Section 7, T.8 S., R. 96 W. of the 6th

P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tracts 38, 39 and 41 in that section.

(6) Exxon Corporation ("Exxon") holds title along the banks of the Colorado River in T. 8 S., R. 96 W., 6th P.M. through mesne conveyance from the original patents granted by the United States, which describe the patented acreage by reference to the official plats of the original survey of the involved lands. These lands are adjacent to the lands claimed by the Government as Tracts 39 and 40 in that section.

(7) The patents to the lands adjoining the Colorado River in the involved reaches contained no reservations of the disputed lands to the United States.

(8) The patents to the lands adjoining the Colorado River in the involved reach incorporate by reference the Government Land Office plats and field notes of the areas surveyed.

B. LAND SURVEYS

1. The original surveys of the lands which are the subject of these proceedings were conducted pursuant to contracts which required the individual surveyors to post a bond for at least double the estimated amount that was to have been due him upon the completion of the contract.

Upon the individual surveyor's certification of completion of his survey, his field notes were examined and approved by the United States Surveyor General and a plat thereof was prepared by the Department of the Interior and certified by the United States Surveyor General to be strictly conformable to the field notes of the individual surveys. No surveys were approved until they were found to have been in exact accordance with the Instructions governing them.

2. Deputy Surveyor Williamson surveyed two townships along the Colorado River, T. 5 S., Rgs. 90 and 91 W. of the 6th P.M. in October, November and December of 1883 and January of 1884. These surveys were governed by the 1855 Manual, the Special Instructions dated December 11, 1883 and October 10, 1883, respectively. Only small portions of the River were involved but the area surveyed does include what is now the Town of New Castle, Colorado. The sections along the River are not fractionally lotted, nor is the River meandered. The surveys of said townships were accepted, respectively, on February 13, 1884 and December 13, 1883 as being in exact accordance with the applicable instructions.

3. Township 8 South, Range 97 West was surveyed by U.S. Deputy Surveyor Henry E. Simon during the period March-April, 1885. This survey was governed by the 1855 Manual, the 1864 Instructions, the 1881 Instructions, the 1884 Annual Instructions and Special Instructions dated December 17, 1884. The plat of Township 8 South, Range 97 West reflects the existence of four "islands"; however, U.S. Deputy Surveyor Simons meandered only the right bank of the River without

mentioning the existence of any such islands in his field notes and no fractional subdivisions were surveyed in sections adjacent to the River with the result that entire legal subdivisions were patented by the United States without reference to the meandered bank of the River, any islands, or the River itself.

The Simons survey was examined in the field, reported as having been correctly surveyed, and accepted by the Commissioner of the General Land Office as having been conducted in exact accordance with the applicable instructions on March 2, 1887.

4. Township 6 South, Range 91 West, Township 6 South, Range 92 West and Township 6 South, Range 93 West were surveyed by U.S. Deputy Surveyor Benjamin F. Clark in October-November, 1886, and October, 1887. These surveys were governed by the 1885 Manual, the 1864 Instuctions, the 1881 Instructions, the 1884 Instructions, Special Instructions dated June 29, 1886 and Supplemental Special Instructions dated June 8, 1887.

U.S. Deputy Surveyor Clark's June 29, 1886 Special Instructions directed him to meander the right bank only of the River. By Supplementary Instructions dated June 8, 1887, U.S. Deputy Surveyor Clark was directed to meander the left bank of the River and he was similarly instructed to meander all islands in the River. U.S. Deputy Surveyor Clark meandered five islands and noted the existence of approximately eleven topographical objects lying between the meander lines of the River.

Upon final examination and approval, the Clark surveys were accepted on January 5, 1888 as being in exact accordance with his instructions.

5. Township 6 South, Range 94 West, Townships 6 and 7 South, Range 95 West and Township 7 South, Range 96 West, Sixth P.M. were surveyed by United States Deputy Surveyor Peter Churchfield during the period October-November, 1889. The Churchfield surveys were governed by the 1855 Manual, the 1864 Instructions, the 1881 Instructions, the 1884 Annual Instructions and Special Instructions dated July 22, 1889. The Churchfield survey resulted in two islands being meandered and a notation of approximately fifteen various topographical objects lying between the meander lines of the River. The Churchfield surveys were examined in the field and accepted on March 12, 1890 as being in exact accordance with the applicable instructions.

6. Township 8 South, Range 96 West was surveyed by U.S. Deputy Surveyor George W. House in June 1891. The House survey was governed by the 1890 manual and Special Instructions dated April 20, 1891. While noting the existence of four land masses between the meander lines of the River, Surveyor House did not meander any islands. The House survey was examined and approved as having been conducted in exact accordance with his instructions on February 23, 1892.

C. SURVEYING INSTRUCTIONS

The original surveys of the lands which are the subject of this protest, conducted between the period March, 1885 through June, 1891, were required to be completed in strict conformity with the laws of the United States and the following described instructions:

1. The 1855 Manual of Surveying Instructions

(a) The 1855 Manual instructed all United States Deputy Surveyors, in regard to the surveying of islands, as follows:

> 4. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to be determined trigonometrically - sighting to a flag or other fixed object on the island, from a special and carefully measured base line, connected with the surveyed lines, on or near the river bank, you are to form connexion (sic) between the meander corners on the river to points corresponding thereto, in direct line, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.

(b) The 1855 Manual stated that the execution of the surveys by the Deputy Surveyors would be monitored by special examinations in order to determine contract compliance (1855 Manual, Introductory Chapter).

(c) The 1855 Manual, regarding the observation of topographical objects encountered during the course of survey, instructed as follows:

> The FIELD NOTES afford the elements from which the plats and calculations in relation to the public surveys are made. . . [T]hey therefore must be a faithful, distinct and minute record of everything officially done and observed by the surveyor and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing boundary corners, & c.; present, as far as possible, a full and complete topographical description of the country surveyed, as to every matter of useful information, or likely to gratify public curiosity (emphasis in original). (1855 Manual, at 15.)

2. The June 1, 1864 Instructions

(a) The Instructions to the Surveyors General of Public Lands of the United States, dated June 1, 1864 (the 1864 Instructions), were similarly deemed a part of every contract for surveying the public

lands of the United States (1864 Instructions, at 3) and they supplemented the 1855 Manual.

(b) The 1864 Instructions, as they related to the survey of small islands, directed the Deputy Surveyors as follows:

> Many applications are received at this office for the purchase of small unsurveyed islands which were omitted when the adjacent lands were surveyed. These islands are usually of too little value to justify the Government in incurring the expense of survey; but where a party desires a survey made and is willing to pay the cost thereof in advance, upon the conditions set forth in these Instructions, it may be done under the provisions of the 10th section of the Act of May 30, 1862 . . .
>
> It will be understood that these Instructions relate only to isolated islands or islands that were omitted when the public surveys were extended over the adjacent lands, and do not apply to islands falling within the regular course of current surveys, which must be included in the contracts for surveying the public land.
>
> As a general rule, a body of land separated from the mainland by a perpetual natural channel may be regarded as an island for the

purposes contemplated in these instructions. (1864 Instructions, at pp. 6-7.)

3. The May 3, 1881 Instructions

(a) The May 3, 1881 Manual of Survey Instruction (the 1881 Instructions) likewise supplemented the 1855 Manual and the 1864 Instructions.

(b) With regard to islands, the 1881 Instructions stated as follows:

> SEC. 3 . . . [A]ll islands, rapids, and bars are to be noticed, with intersections to their upper and lower points to establish their exact situation. . ..
>
> 5. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to be determined trigonometrically; sighting to a flag or other fixed object on the island, from a special and carefully measured base line, connected with the survey lines, on or near the river bank, you are to form connection between the meander corners on the river to points corresponding thereto, and direct line, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.

> 6. In taking the connection of an island with the mainland, when there is no meander corner in line, opposite thereto, to site from, you will measure a special base from the meander corner nearest to such island, and from such base you will triangulate to some fixed point on the shore of the island, ascertain the distance across, and there establish a special meander corner, wherefrom you will commence to meander the island. (1881 Instructions, at pp. 34-35.)

(c) As to the directions given deputy surveyors with regard to the notation of various objects of topography encountered during the course of the survey, the 1881 Instructions stated as follows:

> The utmost care must be taken to pass no object of topography, or change therein, without giving a particular description. The deputy surveyor . . . must make a faithful, distinct and minute record of everything officially done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring and marking lines, establishing corners, etc., and present as far as possible, a full and complete topographical description of the country surveyed. (1881 Instructions, at 35).

(d) With regard to topographical objects, the 1881 Instructions state:

> With the instructions for making subdivisional surveys of townships into sections, the deputy will be furnished by the Surveyor General with a diagram of the exterior lines previously established of the townships to be subdivided . . . [a]nd on such diagram the deputy who subdivides will make appropriate sketches of the various objects of topography as they occur on his lines, so as to exhibit not only the points on line at which the same occur, but also the direction and position of each between the lines, or within each section, as far as practicable, so that every object of topography may be properly completed or connected in the showing. (1881 Instructions, at pp. 42-43.)

4. The July 25, 1884 Instructions

(a) The July 25, 1884 Annual Instructions (the 1884 Instructions) further supplemented the 1855 Manual and supplementary instructions and, as such, were deemed a part of every contract for surveying the public lands of the United States. (Act of May 30, 1862, 12 Stat. 409.)

5. The January 1, 1890 Manual

(a) The January 1, 1890 Manual of Survey Instruction (the 1890 Manual) superceded the 1855 Manual and the Instructions referenced above. Along with subsequent surveying instructions issued by the commissioner

of the General Land Office and such special instructions as were issued by the Surveyor General, they constituted a part of every contract for surveying the public lands of the United States.

(b) As to the treatment to be given islands encountered during the course of the survey, deputy surveyors were instructed under the 1890 Manual as follows:

> 5. The precise relative position of islands, in a township made fractional by the river in which the same are situated, is to be determined trigonometrically; siting to a flag or other fixed object on the island, from a special and carefully measured base line, connected with the survey lines, on or near the river bank, you are to form connection between the meandered corners on the river to points corresponding thereto, in direct line, on the bank of the island, and there establish the proper meander corners, and calculate the distance across.
>
> 6. In taking the connection of an island with the mainland, when there is no meander corner in line, opposite thereto, to site from, you will measure a special base from the most convenient meander corner, and from such base you will triangulate to some fixed point on the shore of the island, ascertain the distance across, and there establish a special meander corner, wherefrom you will

> commence to meander the island (Emphasis in original). (1890 Manual, at 35.)

(c) As to the treatment to be given various topographical objects encountered during the course of the survey, the deputy surveyors were instructed as follows:

> The utmost care must be taken to pass no object of topography, or change therein. without giving a particular description thereof in its proper place in your meander notes. (1890 Manual, at 35.)

(d) Further instructions regarding the notation of topographical objects were stated as follows:

> . . . [T]he deputy surveyor must make a faithful, distinct, and minute record of everything officially done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring, and marking lines, establishing corners, etc., and present, as far as possible, a full and complete topographical description of the country surveyed. (1890 Manual, at 41.)

> . . . [T]he deputy who subdivides will make appropriate sketches of the various objects of topography as they occur on his lines, so as to exhibit not only the points on line at which

> the same occur, but also the direction and position of each between the lines, or within each section, as far as practicable, so that every object of topography may be properly completed or connected in the showing. (1890 Manual, at 43.)

D. THE FIELD NOTE NOTATIONS MADE BY THE SURVEYORS IN ACCORDANCE WITH THEIR INSTRUCTIONS

1. Surveyor Clark Notations. As noted above Deputy Surveyor Clark mendered 6 islands and noted some 11 topographical objects. His references to the latter were variously "bar", "low water island," "Bar in River," "Rocky bar," and "Rock bar," "very wide deposit of boulders and sand," "two narrow parallel sand bars," and "E. end of long island." None of the topographical objects so described are claimed by the Government.

2. Surveyor Churchfield Notations. Immediately downstream of the Clark surveys Deputy Surveyor Churchfield completed the meandering of an island commenced by Deputy Survyor [sic] Clark in Sec. 13, T. 6 S. , R. 94 W. and meandered by triangulation one island in Sec. 13, T. 7 S., R. 96 W. Specific reference is made to the Churchfield field notes and as to what the Government claims, as follows:

(a) In Section 25, Township 6 South, Range 95 West, the BLM investigated as Tract 37 a land

mass originally identified as a "bar or low island" in the Churchfield field notes and has claimed this as public land.

(b) In Section 36, Township 6 South, Range 95 West, the BLM investigated as Tract 38 a land mass originally referred to as a "low island" in the Churchfield surveys and has claimed this as public land.

(c) In Section 36, Township 6 South, Range 95 West the BLM has investigated and claimed a land mass originally identified in the Churchfield field notes as a "small bar or island." This is also designated as Tract 38.

(d) In Section 35, Township 6 South, Range 95 West, the BLM has investigated as Tract 39 and claimed a land mass originally described in the Churchfield field notes as a "long low island, overflowing and unfit for cultivation."

(e) In Section 7, Township 7 South, Range 95 West, the BLM has investigated as Tract 37 and claimed as public land certain lands originally described in the Churchfield field notes as "low overflowing island" . . . "bar or low island."

3. Surveyor House Notations. The specific references in field notes of Deputy Surveyor House of his survey of T. 8 S., R. 96 W. and as to what the Government claims are as follows:

(a) In Sections 4 and 5, Township 8 South, Range 96 West, the BLM has investigated as Tract 37 and

claimed as public lands the land mass referred to as a "gravel bar" in the original House survey notes.

(b) In Section 7, Township 8 South, Range 96 West, the BLM has investigated as Tract 39 and claimed as public lands a land mass referred to in the original House field notes as a "large island" which was not meandered.

(c) In Section 7, Township 8 South, Range 96 West, the BLM has investigated as Tract 38 and claimed as public land a land mass referred to as a "small island" in the original House field notes.

(d) In Section 7, Township 8 South, Range 96 West, the BLM has investigated as Tracts 40 and 41 and claimed as public land two land masses referred to in the original House field notes as "island" and "gravel bar," respectively.

4. Surveyors Williamson and Simons Notations. Surveyors Williamson and Simons did not note the existence of any islands or topographical objects in the field notes of their surveys.

5. The surveys of the involved lands were accepted as having been completed in exact conformance with the Instructions.

6. The involved reach of the Colorado River is non-navigable.

7. The original surveys were neither fraudulent nor erroneous.

8. It is agreed that documents in the administrative record numbers 66-68, 70-72, 75, 76, 93, 94, 110, 111, 123, 132, 141, 141A, 198, 198B, 200, 266, 271, 273, 274, 280, 281 and 292A are authentic and may be admitted into evidence subject to objection as to relevancy and materiality.

IV. FACTS CLAIMED ON WHICH APPELLANTS SHALL PUT ON THEIR PROOF

1. That the disputed lands were below the ordinary high water mark of the Colorado River at the time of the original surveys and were thus part of the riverbed which will be established by exhibits prepared by Mr. William Lorah.

V. FACTS CLAIMED ON WHICH THE GOVERNMENT SHALL PUT ON ITS PROOF

1. That the disputed lands were islands at the time of the original survey.

VI. LEGAL ISSUES AGREED TO

1. A Grantee of land bordering a non-navigable meandered river takes title to all submerged lands between the mainland and the thread of the river, unless expressly reserved by the United States.

2. In the absence of an express reservation of submerged unsurveyed lands, such a reservation cannot be implied.

3. The original Government Land Office plats and field notes of the areas surveyed, having been incorporated by reference in the original patents, are a part of the description of the lands granted.

4. A meander line is a traverse of the margin of a permanent natural body of water which follows the contour of such a body at mean high water. Meander lines are not run as boundaries, but are used to define the sinuosities of the river and to ascertain the quantity of land remaining after segregation of the water area.

5. An "Island" is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel.

VII. LEGAL ISSUES TO BE DETERMINED

1. Whether at the time of the original surveys of the disputed lands there was in effect an official or unofficial policy of the Government not to survey islands falling within the regular course of the surveys of the public lands.

VIII. NAMES AND ADDRESSES OF WITNESSES

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Government's Witnesses:

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RESPECTFULLY SUBMITTED this 12th day of June, 1989.

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OFFICE OF THE REGIONAL SOLICITOR

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(3)

No. 95-253

Supreme Court, U.S.
FILED
OCT 2 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDWARD H. KOCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-253

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDWARD H. KOCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

We explain in our petition for a writ of certiorari that the question presented in this case—whether a federal land patent that conveys riparian land also grants title to unsurveyed islands in the adjacent stream—presents an important issue of federal law that has generated a serious and irreconcilable conflict among the courts of appeals. Respondents' arguments to the contrary are unpersuasive.

1. Respondents, who contend that this case simply involves title to some "insignificant land masses" (Br. in Opp. I), ignore the nationwide significance of the legal question at issue. Congress has plenary authority to dispose of the public lands. See Pet. 3-6, 22-23. The United States has asked this Court to resolve a

legal question of national importance respecting Congress's exercise of that power. We submit that Congress has not authorized the implicit conveyance of unsurveyed public lands to riparian owners free of charge. The six islands at issue here, which range in size from 7 to 67 acres and contain valuable minerals, are by no means "insignificant." See Pet. 7-9. But more important, those islands, which are found in a mere 15-mile reach of a single river, represent only a handful of the thousands of unsurveyed islands that are currently subject, as a consequence of the court of appeals' decision, to an uncertain ownership status. See Pet. 12-13.[1]

2. The case warrants review now because the courts of appeals have adopted contradictory rules governing conveyance of unsurveyed islands. Respondents are wrong in contending otherwise. See Br. in Opp. 5-7, 8, 16. The court of appeals in this case expressly acknowledged that the federal circuits are divided on the question. See Pet. App. 10a-11a & n.6, 13a. Indeed, as we explain in our petition, the courts of appeals have fallen into complete disarray

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[1] Respondents question whether the lands at issue here are actually islands, stating that the administrative law judge made a finding that "the land masses were not islands at the time the original surveys were conducted." Br. in Opp. 3; see Pet. App. 36a-37a. The Interior Board of Land Appeals (IBLA), however, carefully examined that issue and overruled the administrative law judge's finding, *id.* at 59a-65a, and the courts below both accepted the IBLA's ruling, see *id.* at 4a, 74a. Thus, the status of those land masses as islands is beyond question. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task").

respecting the status of unsurveyed islands. See Pet. 13-21.

Respondents' attempts to diminish the conflict are unavailing. For example, they contend that the Seventh Circuit's ruling in *United States* v. *Severson*, 447 F.2d 631 (1971), cert. denied, 404 U.S. 1039 (1972), which upheld the United States' ownership of two islands, turned on the dimensions of the disputed lands, which were approximately 20 and 255 acres in size. Br. in Opp. 16. To the contrary, the Seventh Circuit concluded that the United States retained ownership of the disputed lands because "the unsurveyed islands, existing at the time of statehood, remained the property of the United States," and "Wisconsin law could not and the patents did not convey to the patentees the unsurveyed islands." 447 F.2d at 635; see Pet. 17. In any event, the conflict among the cases cannot be reconciled by distinctions based on the size of the islands. The Ninth Circuit has upheld government ownership in a case involving much smaller islands, which ranged in size from .84 to 8.99 acres. See *Ritter* v. *Morton*, 513 F.2d 942, 944, cert. denied, 423 U.S. 947 (1975); Pet. 17-18; see also *Mission Rock Co.* v. *United States*, 109 F. 763, 769-770 (9th Cir. 1901) (upholding federal ownership of two islands that were respectively .01 and .14 acres in size), aff'd, 189 U.S. 391 (1903).[2]

Respondents also contend that the conflicting cases can be distinguished based on whether the surround-

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[2] As we explain in the petition, although the Ninth Circuit's *Ritter* decision is ultimately correct, it rests on a misunderstanding of this Court's precedents. See Pet. 18 n.9. Hence, that decision contributes somewhat to the current disarray in the courts of appeals.

ing waters are navigable or non-navigable. See Br. in Opp. 18 & n.18. The Court of Claims had suggested such a distinction, see *Bourgeois* v. *United States*, 545 F.2d 727, 730-731 (1976), but the Sixth Circuit has expressly disavowed that rationale, see *Wolff* v. *United States*, 967 F.2d 222, 226 n.3 (1992). See Pet. 19-21. Contrary to respondents' contention, a distinction based on the navigability of the surrounding waters cannot reconcile the case law. Indeed, that rationale would also conflict with state supreme court decisions that have recognized that the United States retains unsurveyed islands whether or not the surrounding waters are navigable. See *Bode* v. *Rollwitz*, 199 P. 688, 690-691, 692-693 (Mont. 1921); *Steinbuchel* v. *Lane*, 51 P. 886, 887-888 (Kan. 1898).

3. Respondents' arguments in support of the court of appeals' decision demonstrate precisely why the Court should review this case. This Court has made clear that Congress requires upland to be surveyed prior to disposition and that the United States therefore retains ownership of unsurveyed islands. See Pet. 17-29; see also, *e.g.*, *Moss* v. *Ramey*, 239 U.S. 538 (1916); *Scott* v. *Lattig*, 227 U.S. 229 (1913); *Buxton* v. *Traver*, 130 U.S. 232, 235 (1889). Those principles are longstanding and widely acknowledged. See, *e.g.*, *Severson*, 447 F.2d at 635; *Bode*, 199 P. at 692-693; *R.A. Mikelson*, 26 I.B.L.A. 1 (1976); *Emma S. Peterson*, 39 Pub. Lands Dec. 566 (1911); BLM, *Manual of Surveying Instructions* § 3-122 (1973). Nevertheless, as a result of the arguments put forward by respondents and accepted by the court of appeals, the law has now become uncertain and confused.

Respondents rely on cases, such as *Grand Rapids & I.R.R.* v. *Butler*, 159 U.S. 87 (1895), that this Court specifically distinguished in *Scott* v. *Lattig*, 227 U.S. at 244. Compare Pet. 14-16 with Br. in Opp. 9. They also conflate the principles that apply to uplands with those that apply to submerged lands. Compare Pet. 28 (quoting this Court's admonition that the rules applicable to submerged lands are not applicable to "islands or fast lands" (*Texas* v. *Louisiana*, 410 U.S. 702, 713 (1973)) with Br. in Opp. 2 (stating that "[t]his case concerns title to the bed of a non-navigable river"). Furthermore, respondents would subordinate the intent of Congress, which has plenary power over the disposition of public lands, see *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 47-54 (1983), to dubious inferences respecting the subjective beliefs of the Department employees who surveyed the lands and prepared the patents. Compare Pet. 22-27 with Br. in Opp. 21-23. Finally, respondents' contention that they acquired title to the islands, even though they regard the United States' intent on that point here as "ambiguous" (Br. in Opp. 23), cannot be reconciled with "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Western Nuclear*, 462 U.S. at 59.

This case presents the appropriate opportunity to clarify the controlling principles in this area of public land law, where clear and certain rules are essential to efficient government and to the protection of property rights and settled expectations.

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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